141

(1)

Supreme Court, U.S.
FILED

09-363 SEP 24 2009

OFFICE OF THE CLERK

No. 09-___

In the Supreme Court of the United States

KEVIN COOPER,

Petitioner,

v.

ROBERT K. WONG, ACTING WARDEN, SAN QUENTIN STATE PRISON, SAN QUENTIN, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

David T. Alexander
Law Office of David T. Alexander
332 Sheridan Avenue
Piedmont, CA 94611
Telephone: (650) 387-4382
Facsimile: (510) 654-3773

*Norman C. Hile
ORRICK, HERRINGTON & SUTCLIFFE LLP
400 Capitol Mall
Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7900
Facsimile: (916) 329-4900

Counsel for Petitioner

September 24, 2009

* Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

1. Is a person convicted of murder, but later shown to be innocent, eligible for execution? *See* Appendix to the Petition ("App.") at 306 ("The State of California may be about to execute an innocent man") (Fletcher, J., dissenting from denial of en banc review); *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J. concurring).

2. When a district court must conduct an evidentiary hearing with respect to evidence of innocence in a successive habeas corpus petition, what process is required to conduct a full and fair hearing to afford for a reliable determination? *See In re Davis*, __ S.Ct. __, WL2486475 (Aug. 17, 2009).

3. When a habeas corpus petitioner has been allowed to file a successive petition in a federal district court, what standard applies:

(a) the standard in *Schlup v. Delo*, 513 U.S. 298, 316 (1995) ("it is more likely than not that no reasonable juror would have convicted him in light of" new evidence of innocence");

(b) the standard in 28 U.S.C.§ 2244(b) ("the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense"); or,

(c) the standard in *Brady v. Maryland*, 373 U.S. 83 (1963), if a *Brady* claim is alleged ("a reasonable probability of a different result")?

LIST OF PARTIES AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page.

Petitioner is not a nongovernmental entity within the meaning of Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Introduction 3

B. The Crime Scene Investigation, Evidence Mishandling And Destruction 7

1. The Pro Keds Shoeprints 9

2. SBSD's Destruction of the Bloody Coveralls, Deputy Eckley's False Testimony at Trial, and the Failure to Turn over the "Disposition Report" 11

3. Additional Physical Evidence 13

4. The Blue Shirt 14

C. The 1984-85 Trial 15

D. State Court Post-Conviction Proceedings And First Federal Petitions 16

E. The Ninth Circuit's Ruling On Cooper's Request For Permission To File A Successor Petition 16

F. The 2004-05 District Court Proceedings 17

G. The Three Judge Panel's Ruling..... 19

H. The Petition For Rehearing En Banc And The Dissents 20

REASONS FOR GRANTING THE WRIT..... 21

A. This Court Should Define The Standard Governing An Actual Innocence Claim 22

B. This Court Should Provide Guidance To The Circuits And The District Courts About How A Petitioner May Develop The Record To Prove His Innocence 23

C. The Circuits And The District Courts Require Guidance About Whether To Apply The Standard in *Schlup*, In AEDPA, Or In *Brady*..... 25

1. The Current Standard for Evaluating Claims of Actual Innocence in Second or Successive Petitions is Unclear..... 25

2. The Circuits Require Guidance with Respect to Which Standard Applies 27

3. The Circuit and District Courts Also Require Guidance About how to Treat Successor Petitions that Include Claims Under *Brady v. Maryland* 31

CONCLUSION..... 39

APPENDICES

APPENDIX A: Panel Opinion of the United States Court of Appeals for the Ninth Circuit, including United States District Court Opinion as Appendix A Thereto.....App. 1-279

APPENDIX B: En Banc Opinion of the United States Court of Appeals for the Ninth Circuit .....App. 280-304

APPENDIX C: Order Denying Rehearing With Suggestion for Rehearing En Banc, including Dissenting Opinions of 11 Judges .....App. 305-446

TABLE OF AUTHORITIES

Cases Page(s)

Banks v. Dretke,
540 U.S. 668 (2004) 32, 38

Berger v. United States,
295 U.S. 78 (1935) 37

Brady v. Maryland,
373 U.S. 83 (1963) ..... passim

Cone v. Bell,
129 S. Ct. 1769 (2009) 38

Cooper v. Brown,
565 F.3d 581 (9th Cir. 2009) 1

Cooper v. Brown,
510 F.3d 870 (9th Cir. 2007) 1

Cooper v. Woodford,
357 F.3d 1019 (9th Cir. 2004) 1

In re Davis,
__ S.Ct. __, WL 2486475
(Aug. 17, 2009) ..... i, 6, 7, 21, 22, 23, 24

Douglas v. Workman,
560 F.3d 1156 (10th Cir. 2009) 34, 35

Evans v. Smith,
220 F.3d 306 (4th Cir. 2000) 35, 36

Goldblum v. Klem,
510 F.3d 204 (3d Cir. 2007) 27, 29

Herrera v. Collins,
506 U.S. 390 (1993) ..... i, 21, 22, 23, 24

House v. Bell,
547 U.S. 518 (2006) 23

Jordan v. Dep't of Corrections,
485 F.3d 1351 (11th Cir. 2007) 27, 28, 29

Lott v. Bagley,
569 F.3d 547 (6th Cir. 2008) 27, 30

Mooney v. Holohan,
294 U.S. 103 (1933) 10

Napue v. Illinois,
360 U.S. 264 (1959) 10

Panetti v. Quarterman,
551 U.S. 930 (2007) 33

People v. Cooper,
809 P.2d 865 (Cal. 1991) 16

Schlup v. Delo,
513 U.S. 298 (1995) ..... passim

Slack v. McDaniel,
529 U.S. 473 (2000) 36

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 36

Strickler v. Greene,
527 U.S. 263 (1999) 32

Tompkins v. Sec'y, Dep't of Corrections,
557 F.3d 1257 (11th Cir. 2009) 36

United States v. Bagley,
473 U.S. 667 (1985) 32

United States v. Lopez,
__ F.3d __, 2009 WL2501886
(9th Cir. Aug. 18, 2009) 33, 34

Federal Constitution, Statutes & Legislative History

U.S. Const.,
amend. VIII 2, 21
amend. XIV 2

28 U.S.C.
§ 451 2
§ 1254 1
§ 2244 ..... passim
§ 2403 ..... 1, 2

H.R. Rep. No. 104-518
at 111 (1996) 32

Other Sources Cited

Samuel R. Gross, et al., Exonerations in the United States 1989 Through 2003, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005). 6

Stephanos Bibas, "*The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward The Search for Innocence?*" Paper 81, Scholarship at Penn. Law (2005) 38

Craig L. Beyler, *Analysis of the Fire Investigation Methods and Procedures Used in the Criminal Arson Cases Against Ernest Ray Willis and Cameron Todd Willingham*, (Aug. 17, 2009), http://www.docstoc.com/docs/document-preview/aspx?doc.id=10401390 6

David Grann, *Trial by Fire*, THE NEW YORKER, Sept. 7, 2009..... 6

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Ninth Circuit, reported at 510 F.3d 870 (9th Cir. 2007) is reprinted at App. 1-279. That opinion affirms and attaches the opinion of the United States District Court for the Southern District of California denying Cooper's successor petition for writ of habeas corpus. App. 41-279. The order denying Cooper's petition for rehearing with suggestion for rehearing en banc, reported at 565 F.3d 581 (9th Cir. 2009), is reprinted at App. 305-446. That order includes the dissenting opinions of 11 judges. The opinion of the United States Court of Appeals for the Ninth Circuit granting Cooper permission to file his successor habeas petition, reported at 357 F.3d 1019 (9th Cir. 2004), is reprinted at App. 280-304.

JURISDICTION

This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254. The Court of Appeals issued its panel opinion on December 4, 2007. App. 1-279. Cooper's timely petition for rehearing with suggestion for rehearing en banc was denied on May 11, 2009. App. 305. Justice Kennedy extended the time for the filing of this petition to and including September 24, 2009.

Because this petition draws into question the constitutionality of 28 U.S.C. § 2244, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act has been drawn in question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case invokes the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also invokes the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "...nor cruel and unusual punishment inflicted."

This case also involves a section of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(b)(2)(B), which provides in relevant part:

> A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application shall be dismissed unless –

> ...(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

A. Introduction

In 2004, the Ninth Circuit, sitting en banc, granted Kevin Cooper permission to file a successor habeas corpus petition. App. 280-94. The court's decision was compelled by substantial evidence of Cooper's innocence and by *Brady* violations that denied him the right to a trial free of constitutional error. The Ninth Circuit remanded the case to permit forensic testing to demonstrate whether law enforcement manufactured crucial evidence against him and to permit him to develop further evidence that supported his claims for relief. App. 284.

As eleven dissenting judges found, instead of providing Cooper a full and fair hearing to develop his claims, "the district court impeded and obstructed Cooper's attorneys at every turn as they sought to develop the record. The court imposed unreasonable conditions on the testing the en banc court directed; limited testimony that should not have been limited; and found facts unreasonably, based on a truncated and distorted record."

App. 310. The dissenting judges recognized that the district court thwarted Cooper from completing the testing the Ninth Circuit had ordered, noting that the State of California's own laboratory consultant's test supported Cooper's claim of evidence tampering, but that the district court permitted the lab to withdraw those results when it learned they supported Cooper. In short, the district court "precluded Cooper from having his last day in court." App. 432.

Despite the stunted proceedings below, convincing new evidence proves that Cooper was wrongly convicted of murder and sentenced to death. The newly available evidence includes proof that:

(1) the prosecution presented false evidence that shoes that could only be found in prisons produced bloody shoeprints at the crime scene, despite the prison warden alerting law enforcement prior to trial that this evidence was false;

(2) a San Bernardino County Sheriff's Department ("SBSD") deputy lied at trial in testifying he acted without authorization in destroying before trial exculpatory evidence in the form of bloody coveralls worn by one of the likely killers;

(3) a vial supposedly containing Cooper's blood and used at trial to identify Cooper as the culprit is contaminated with the DNA of one or more other persons;

(4) laboratory testing the Ninth Circuit ordered in 2004 supports Cooper's contention that SBSD

planted his blood on a tan t-shirt found near the crimes;

(5) SBSD neither tested nor disclosed to the defense a bloody blue shirt it recovered near the crime scene two days after the crimes that supported other evidence of multiple perpetrators, but which is now inexplicably missing; and

(6) witnesses never interviewed by SBSD came forward to say that three strange behaving men, one with blood on his coveralls, visited the Canyon Corral, a bar within sight of the crime scene late on the night of the murders. Their description is consistent with contemporaneous statements by Josh Ryen, the sole surviving victim, as well as that of other witnesses who saw three white men speeding away from the crime scene.

Moreover, despite the district court's refusal to permit Cooper meaningful discovery and presentation of evidence, he has now proved no less than three *Brady* violations. App. 395. What makes these violations all the more significant is that, as discussed below, virtually all of the evidence the jury heard to convict Cooper has now been tarnished.

The district court, as well as the Ninth Circuit panel that affirmed the denial of the successor petition, refused to acknowledge the persuasive evidence of Cooper's innocence or permit him a fair opportunity to further develop his innocence claim. But, as more and more convicted men and women

are found innocent,[1] some after many years of wrongful incarceration or even after execution,[2] it is imperative that those facing death sentences have the opportunity to prove their innocence. As this Court concluded in *In re Davis*, when a habeas petitioner has made a sufficient showing of innocence, the federal courts must conduct a fair fact-finding process to determine whether relief is warranted.

Moreover, the Ninth Circuit rulings divulge a circuit split on the legal standard that should be applied where a condemned prisoner asserts in a successor petition claims of actual innocence accompanied by constitutional error. This split is not surprising given that, in enacting AEDPA in 1996, Congress created a standard for review at variance with this Court's ruling in *Schlup*. The AEDPA appears to create an impediment to granting relief when both innocence and constitutional claims exist. Within the Third, Sixth, Ninth, and

---

[1] *See* Samuel R. Gross, et al., Exonerations in the United States 1989 Through 2003, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005) ("The rate of exonerations increased sharply over the 15 year period of the study, from about 12 a year through the early 1990's to an average of 43 a year after 2000.")

[2] In August 2004, the State of Texas executed Cameron Todd Willingham who has now been shown to be innocent. *See* Craig L. Beyler, *Analysis of the Fire Investigation Methods and Procedures Used in the Criminal Arson Cases Against Ernest Ray Willis and Cameron Todd Willingham*, (Aug. 17, 2009), http://www.docstoc.com/docs/document-preview/aspx?doc.id=10401390; David Grann, *Trial by Fire*, THE NEW YORKER, Sept. 7, 2009.

Eleventh Circuits, courts are issuing decisions that are inconsistent and divergent in the standard applied to successor petitions alleging innocence. Further, circuit courts are applying inconsistent standards to meritorious constitutional claims under *Brady*. Critically, none has used the test this Court set out in *In re Davis*: "whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."

As Judge Fletcher stated in closing his dissent: "We owe it to the victims of this horrible crime, to Kevin Cooper, and to ourselves to get this one right. We should have taken this case en banc and ordered the district judge to give Cooper the fair hearing he has never had." App. 431.

Cooper asks this Court to give him that hearing, and in so doing to provide to circuit and district courts the proper standard they should apply to successor petitions that include strong claims of innocence and constitutional error.

B. The Crime Scene Investigation, Evidence Mishandling And Destruction

The case against Cooper was circumstantial. The prosecution had many hurdles before it could pin the murders on Cooper. First, the attacks included over 140 wounds inflicted by three or more weapons on five victims in the course of two to four minutes. The coroner initially concluded that it appeared virtually impossible a single assailant could be responsible. Second, the sole surviving victim, Josh Ryen, twice described the assailants as three white men. Cooper is black. Third, even though Cooper was in

desperate need of money, clearly visible cash and credit cards were left untouched at the crime scene. Fourth, a bloody shoeprint and a single drop of blood were the only physical evidence that purportedly linked Cooper to the crime scene. Both pieces of evidence have now been thoroughly discredited. Fifth, and of paramount significance, despite the frenzied nature of the murders, neither Cooper's fingerprints nor his hair were found in the Ryen house.

Unfortunately, the crime scene was one of the worst managed in history. Scores of unauthorized people visited the scene during the investigation. Counting those identified at trial, over 70 persons walked through the Ryen house within 24 hours after the crimes' discovery. Crucial evidence was lost, contaminated, compromised and ignored. The trial judge told the prosecution in 1985, "Counsel, as I sat there and listened to the evidence over a prolonged period of time, I thought . . . [w]ithout any criminalistic experience at all, I could have gone in there and done a better job, I think, than [SBSD] did."

Initially, SBSD sought as suspects the three white men who Josh Ryen described and who witnesses reported speeding away from the scene. SBSD also received information from a woman who reported that her ex-boyfriend and two others were likely involved.

But SBSD abruptly changed focus when it learned that Cooper had escaped from prison two days before the murders and had hidden out in a

house close to the Ryen home. Under intense pressure to arrest someone, SBSD quickly made Cooper its exclusive suspect. Cooper's identification as the prime suspect set off a wave of racially fueled anger throughout San Bernardino County. This lynch-mob atmosphere culminated in a crowd outside the trial courthouse staging a mock hanging with racial epithets.

With a suspect the public wanted convicted, SBSD and the prosecution fashioned both testimony and forensic evidence to prove that Cooper was the culprit. That testimony and forensic evidence have since been shown to be completely unreliable.

1. The Pro-Keds Shoeprints

In authorizing the successor petition, the Ninth Circuit relied on a declaration by former prison warden Midge Carroll related to a bloody shoeprint found at the crime scene. At trial, the prosecution presented testimony that the shoeprint came from a Pro-Keds Dude tennis shoe, a shoe it claimed was only available from California prisons.

In 1984, prior to Cooper's trial, Warden Carroll learned the prosecution's theory was false because her prison did not issue prison-manufactured shoes. In fact "there was no special shoe, . . . the shoes we ... issued were common, ordinary shoes . . . commonly manufactured and sold in retail stores." Recognizing that the prosecution was pursuing a false premise, Carroll shared her information with one of the two SBSD lead detectives. The prosecution, however, never disclosed Carroll's information to the defense.

Nor did the prosecution alter its presentation against Cooper.

At trial, the prosecution called Michael Newberry, Merchandise Manager for Pro-Keds. He testified that the Dude was "supplied strictly for prison use within the State of California," and was unavailable for sale in retail stores in any state in the country. The prosecutor emphasized those assertions in both his opening statement and closing argument.

We now know that this was untrue, not only through the 2004 testimony of Carroll, but through the 2004 testimony of Keds' executive Don Luck. Luck testified that smaller chains and individual stores, including those on both coasts, could order Dudes through Keds' wholesale catalog. Dudes sold to institutions were the "[s]ame shoe, same storage, same shipment point" as Dudes sold to retail outlets. Luck's 2004 testimony disproved the prosecution's assertion at trial that the shoeprints must have come from a prison issued shoe.

In his dissent, Judge Fletcher found the prosecution had committed both a *Brady* violation in not disclosing Carroll's call to the SBSD and a violation of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Mooney v. Holohan*, 294 U.S. 103 (1933), in the knowing presentation of false evidence. App. 387-90; 395-407.

2. SBSD's Destruction of the Bloody Coveralls, Deputy Eckley's False Testimony at Trial, and the Failure to Turn over the "Disposition Report"

The 2004-05 evidentiary hearings uncovered additional *Brady* violations. Prior to trial, a woman named Diana Roper provided SBSD with bloody coveralls belonging to her boyfriend Lee Furrow. In June 1982, Furrow was released from prison after serving time for the 1974 strangulation death of Mary Sue Kitts. On the night of the murders, Furrow wore a tan Fruit of the Loom t-shirt that Roper had given him. When Furrow walked into Roper's home before dawn the following morning, he was wearing long sleeved coveralls splattered with blood, but he was no longer wearing the tan t-shirt. Furrow left the coveralls on the closet floor.

A few days later, the news reported a hatchet was found near the crime scene. Roper discovered that Furrow's hatchet was missing. Roper identified the hatchet found near the crime scene in a photograph as resembling Furrow's. Roper notified SBSD of the situation.

Deputy Eckley went to Roper's house and left with the coveralls. Eckley found that the coveralls were "[h]eavily splattered" with blood. He took the coveralls into evidence and wrote a report to his supervisor. Eckley's report, dated June 10, 1983, stated that Roper "suspects that the bloody coveralls are from the [Ryen] murders and has further information regarding that incident and/or possible

suspect/s." On May 26, 1984, in an audio-taped interview, Eckley said he believed Roper's story.

Nevertheless, SBSD never tested Furrow's bloody coveralls. Instead, Eckley discarded them in a dumpster during Cooper's preliminary hearing. At trial, Eckley testified that he acted alone in discarding the bloody coveralls.

In 1998, Cooper's investigator discovered an SBSD "Disposition Report" existed for the bloody coveralls dated December 1, 1983. The report stated, "destroyed no value coveralls." The initials "KS" appeared on the report. This report had not been disclosed to the defense, and SBSD refused to cooperate in identifying "KS."

In 2005, Cooper's investigator located a former SBSD Property Officer named Kenneth Schreckengost. Schreckengost, who was Eckley's supervisor at the time the coveralls were destroyed, admitted that the initials "KS" on the Disposition Report were his. He also confirmed approving the destruction of the coveralls. Schrechengost's directive to destroy the bloody coveralls was not disclosed to the defense at the time of trial.

Given the disposition report and Schreckengost's testimony in 2005, we now know that Eckley's testimony at trial that he acted alone in discarding the bloody coveralls was false. In addition to Eckley's false testimony, Judge Fletcher found two *Brady* violations with respect to the bloody coveralls: the failure to preserve them and the failure to turn over the disposition report. App. 407-12.

3. Additional Physical Evidence

Numerous pieces of evidence in Cooper's case suggest evidence tampering, and false evidence presented at trial. This evidence includes a single drop of blood found in the Ryen home (A-41), a vial of Cooper's blood (VV-2), and cigarette butts (V-12 and V-17). Cooper attempted repeatedly to develop the record as to this evidence at the 2004-05 district court hearing. The district court thwarted all of Cooper's efforts.

A-41 was found near the baseboard in the hallway outside the master bedroom, away from the bodies and any other blood evidence. Deputy Daniel Gregonis tested A-41 at the time of trial to see if it matched Cooper's blood EAP type. Gregonis knew the prosecution was focusing on Cooper when he did his testing, and tested A-41 side by side with VV-2, Cooper's own blood. Gregonis later lied about doing this, claiming he tested the samples blind. Additionally, upon receiving additional information about Cooper's blood EAP type, Gregonis altered his lab notes.

At the time of trial, Gregonis claimed that his pre-trial testing had completely consumed A-41, foreclosing the possibility of any defense testing. During post-conviction proceedings, A-41 reappeared in a bag containing Cooper's blood and saliva. The testing of A-41 identified DNA both from Cooper and another unknown individual. The State did not disclose that prior to this testing, Gregonis had removed A-41's container and a sample of Cooper's saliva from evidence storage. Gregonis did not

return this container for 24 hours. In 2005, Cooper discovered for the first time that VV-2 is also contaminated with DNA from another person.

In addition to the blood evidence, there are serious questions surrounding cigarette butts denominated V-12 and V-17 found in the Ryens' station wagon. The cigarette butts were not discovered in an initial search of the car. Cooper did, however, leave behind cigarette butts in the house he occupied, as well as in his own car. With respect to testing, Gregonis claimed that pretrial testing entirely consumed V-12 and V-17. Yet, at trial, an SBSD criminalist showed V-12 cigarette paper in a bag to the jury.

Post conviction, the prosecution produced as V-12 something that bore no resemblance to what had been presented at trial. More disturbing, the cigarette butt recovered from Cooper's car was no longer in the evidence bag in which it was once stored, and cigarette butts recovered from the hideout house turned up missing, as did those originally described as being in the Ryen station wagon's ashtray.

4. The Blue Shirt

At the evidentiary hearing in 2004, Cooper learned for the first time that two days after the murders, SBSD recovered a blue shirt with possible blood on it near the murder scene. Its existence was never disclosed to the defense before or after trial. It remains missing without explanation.

Significantly, this blue shirt matched what one of the three strangers in the Canyon Corral bar

reportedly was wearing. After Cooper learned of the shirt, Cooper presented testimony at the 2004 evidentiary hearing from Laurel Epler, a woman who lived in the vicinity of the Ryen home. Epler testified she had called SBSD to report finding the blue shirt. The log reflects that SBSD Deputy Field recovered the shirt. Epler recalled that the shirt was blue and that its location was different from the location where the tan Fruit of the Loom t-shirt was found the following day. The tan t-shirt also had blood stains on it and was the subject of testing in 2001 and 2004.

When he learned about the blue shirt at the 2004 evidentiary hearings, Cooper requested discovery to investigate its whereabouts. The district court denied these requests and refused any further hearings on it. Incredibly, the prosecution's only response to the discovery of the blue shirt was that it never existed. Judge Fletcher found the prosecution's failure to turn over the blue shirt, as well as its failure to turn over the police logs that identified the blue shirt, to be an additional *Brady* violation. App. 412-16.

C. The 1984-85 Trial

The jury that heard the case against Cooper from December 1984 until May 1985 did not know about Gregonis' post-conviction tampering with A-41, about the contamination of VV-2, about the change in cigarette butt V-12, nor how cigarette butts from the hideout house and Mr. Cooper's car are now unaccounted for. The jury also did not know about the blue shirt. Nor did it know about Warden

Carroll telling SBSD that the Dude shoes were available at retail stores or that Keds executive Don Luck and the Pro-Keds catalogue confirmed this and impeached Newberry. It did not know about the disposition report showing SBSD approved Deputy Eckley discarding Furrow's bloody coveralls in a dumpster.

Still, the jury deliberated for seven days over guilt. The jury deliberated an additional four days before returning a death sentence. Commenting on the jury's deliberations, one juror stated that if there had been one less piece of evidence, the jury would not have voted to convict.

D. State Court Post-Conviction Proceedings And First Federal Petitions

The California Supreme Court affirmed the conviction and sentence. *People v. Cooper*, 809 P.2d 865 (Cal. 1991). Over the course of the next 13 years, Cooper steadfastly maintained his innocence through numerous state and federal petitions, hearings, and appeals. He filed his first petition for writ of habeas corpus in federal court in 1994, which was denied in 1997. Cooper also filed state court petitions as well as several petitions with this Court, all of which were denied. In 1998, Cooper filed a second federal petition, which was denied the same year and affirmed on appeal in November 2002.

E. The Ninth Circuit's Ruling On Cooper's Request For Permission To File A Successor Petition

Facing execution on February 10, 2004, on February 6, 2004, Cooper filed his application to the

Ninth Circuit requesting permission to file a successor habeas corpus petition based on significant new evidence that went both to his innocence and to the *Brady* violations. Cooper also asked for forensic testing of the tan t-shirt to prove that SBSD had tampered with it, as well as mitochondrial testing of the hairs clutched in the victims' hands.

On February 9, 2004, less than eight hours before his scheduled execution, by a 9-2 vote, an en banc panel of the Ninth Circuit granted Cooper's request to file a successor petition. App. 280-305. The en banc court also found that the framework for analyzing an actual innocence claim coupled with underlying constitutional violations remained unsettled. App. 281-84. It ordered the district court to test the bloodstains on the t-shirt to determine whether they showed heightened levels of EDTA, a blood preservative whose presence would support Cooper's claim of tampering. App. 293-94. The court also ordered testing of blonde hairs found clutched in Jessica Ryen's hands. App. 294. Thus, the purpose of the testing was to determine whether, based on analysis of mitochondrial DNA, the hairs belonged to a third party perpetrator.

F. The 2004-05 District Court Proceedings

United States District Judge Marilyn Huff, who had denied Cooper's two previous federal habeas petitions, presided over Cooper's successor petition. During those proceedings, Judge Huff effectively denied all of Cooper's discovery requests, forbade his experts from examining the t-shirt and exploring the contamination of VV-2, the reappearances of A-41,

the ever-changing V-12, and the undisclosed blue shirt. It is these district court proceedings that Judge Fletcher, and other dissenting Ninth Circuit judges, found to be inherently unfair. App. 306.

As to the testing, which all 11 dissenting judges found not done as required, after excluding Cooper's expert from any role in designing a proper testing protocol for the t-shirt, the district court designed one that did not even include determining whether the tested stain included blood, much less Cooper's DNA. Ultimately, the State's consultant reported test results showing elevated levels of EDTA in the tested stain. These results supported Cooper's theory that his blood had been planted on the t-shirt. Faced with this, the district court allowed the State to withdraw these results without requiring any further explanation.

As to the mitochondrial DNA testing, the district court refused to permit Cooper's expert to review any hairs not previously examined, and sent hairs to the laboratory that had already been eliminated as potentially belonging to any other suspect.

The district court also refused to permit Cooper any discovery or presentation of evidence with respect to blood spot A-41, contaminated blood vial VV-2, and cigarette butts V-12 and V-17. The district court refused defense examination of SBSD files that the State claimed refuted Warden Carroll's testimony. It also denied Cooper's request to explore evidence that SBSD tampered with a witness during the 2004-05 hearing. The district court also refused to allow Cooper to develop evidence regarding the

manipulation of Josh Ryen's testimony at the time of trial, or the circumstances that caused him to change his description of the murderers as three white men. The district court permitted Josh Ryen, however, to make an unsworn, "victim impact" statement, not subject to cross-examination, at the end of the evidentiary hearing. It also attached Ryen family photos to its opinion.

In analyzing the evidence, the district court first determined that each of Cooper's claims had to satisfy the requirements of § 2244(b) before they could be considered. The district court then found that Cooper did not satisfy § 2244(b). App. 87-89; 167-68. The court then reasoned that *if* "AEDPA does not apply to this successive petition, then the gateway claims presented by Petitioner are governed by *Schlup v. Delo*," found that Cooper did not meet those requirements of *Schlup*. App. 98-100; 167-68.

G. The Three Judge Panel's Ruling

The Ninth Circuit granted Cooper's request for a certificate of appealability. After briefing and argument, a three judge panel affirmed the district court's denial of the successor petition. App. 1-32. The decision again acknowledged that "the framework for analyzing an actual innocence 'gateway' claim under [*Schlup*] remains unsettled." App. 7.

In a concurrence that reads more like a dissent, Judge McKeown recited the many instances of mishandling of evidence, "suspicious circumstances," reappearing blood samples, and outright misstatements by the prosecution as to evidence it

likely knew to be false. App. 33-41. She stated: "[s]ignificant evidence bearing on Cooper's culpability has been lost, destroyed or left unpursued." App. 33. Despite "serious questions as to the integrity of the investigation and evidence supporting the conviction," Judge McKeown found herself constrained by AEDPA, concluding that the state of the record did not "leap the clear and convincing hurdle of AEDPA." App. 34, 41. She did not apply the *Schlup* analysis to determine if the "more likely than not standard" might provide relief, despite what she described as a "wholly discomforting" result. App. 41. Judge McKeown's frustrated concurrence acknowledged that confidence in some of the evidence is "murky at best," but that "lost, destroyed or tampered evidence cannot be factored into the final analysis of doubt." *Id.*

H. The Petition For Rehearing En Banc And The Dissents

Cooper petitioned for rehearing with a suggestion for rehearing en banc. On May 11, 2009, the Ninth Circuit issued its five sentence order denying rehearing.

Eleven circuit judges made their dissent public. Recognizing that the Ninth Circuit has not yet decided what standard applies to a successor petition such as this one, Judge Fletcher's opinion found that Cooper met both the *Schlup* standard and the standard under § 2244(b). App. 417. It concluded that SBSD tampered with evidence, that the prosecution presented false testimony at Cooper's

trial, and that, despite the Ninth Circuit's order with respect to testing and evaluation of innocence and *Brady* claims, the district court failed to give Cooper a fair hearing. App. 310.

Additionally, the dissents concluded that the district court's factual inquiry was insufficient and that the case should be remanded for a "full and fair evidentiary hearing." App. 432.

REASONS FOR GRANTING THE WRIT

In *Herrera v. Collins*, 506 U.S. 390, 417 (1993), this Court assumed that the execution of an innocent defendant is unconstitutional, but did not articulate the standard for making such a determination. This Court recently confronted the contours of, and the procedures for resolving, actual innocence claims in *In re Davis*. In transferring the case to the district court, this Court did not, however, definitively resolve what it had assumed in *Herrera*.

This case gives this Court the opportunity to exercise its plenary authority to resolve that question: whether the Eighth Amendment would permit the execution of a person convicted of murder, but later shown to be innocent. It also presents the opportunity to define an actual innocence claim, establish the burden that a petitioner must satisfy in order to be entitled to relief, and provide guidance to lower courts on the fact-finding procedures that should be afforded a petitioner in proving such a claim. Despite the substantial evidence that Cooper did not commit the capital crimes, he has never been permitted the opportunity to prove his innocence. Indeed, the

district court not only failed to permit Cooper to develop an adequate record, but actively thwarted him from proving his case. Moreover, both the district court and the Ninth Circuit did not have the benefit of, and thus did not apply, the "clearly establishes" standard that this Court recently articulated in *Davis*.

Certiorari also is warranted to resolve splits among the circuits as to the appropriate standard to be applied where there is a strong likelihood of actual innocence and the presence of constitutional error. When this Court issued its decision over a decade ago in *Schlup*, it created an exception to the "abuse of the writ" doctrine for cases where a condemned prisoner could make a strong showing of innocence coupled with a showing of a constitutional error. Since that time, the need for such an exception has been shown time and again, as exonerations of people wrongly convicted of crimes have become frequent events. These exonerations prove that our system of justice is fallible even in death penalty cases, where the level of scrutiny should be the highest.

A. This Court Should Define The Standard Governing An Actual Innocence Claim.

In *Herrera*, this Court assumed that "a *truly persuasive* demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," reasoning that "the threshold showing for such an assumed right would necessarily be extraordinarily high." (emphasis added). Since *Herrera*, the Court has explicitly

declined to resolve the question of how a freestanding innocence claim can merit federal habeas relief. *House v. Bell*, 547 U.S. 518, 519 (2006). The Court has, however, maintained that "whatever burden a hypothetical freestanding innocence claim would require" is necessarily high. *Id.* at 555. Court decisions in the wake of *Herrera* assume that an innocent person is entitled to relief, but that the showing must, in the words of *Herrera*, be "truly persuasive."

Earlier this year, petitioner Troy Davis filed an original habeas corpus petition in this Court alleging a freestanding innocence claim. *In re Davis*, __ S.Ct. __, WL2486475 (Aug. 17, 2009). This Court transferred the petition to a district court for hearing and determination. In doing so, this Court stated that: "The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial *clearly establishes* petitioner's innocence." *Id.* (emphasis added).

While this Court did not say so explicitly, the ruling in *Davis* can only mean that free standing actual innocence claims not only exist, but that someone who was convicted of murder, but is later shown to be innocent, is not to be executed.

B. This Court Should Provide Guidance To The Circuits And The District Courts About How A Petitioner May Develop The Record To Prove His Innocence.

The Court's decision in the *Davis* case also suggests that relief for a freestanding innocence

claim can be granted if a sufficiently strong showing is made. The showing the petitioner must make, however, remains unclear. While *Herrera* presumed that a "truly persuasive" showing was required, *Davis* suggests the showing must be one that "clearly establishes" innocence.

Without guidance from this Court as to the appropriate standard for proving actual innocence, there is uncertainty in the district courts as to the nature and extent of the evidentiary hearings that should be conducted. In Cooper's case, eleven judges agreed in dissent of the Ninth Circuit's denial of en banc review that the district court had failed to afford him the opportunity to prove his innocence. As Judge Fletcher put it:

> There is no way to say this politely. The district court failed to provide Cooper a fair hearing and flouted our direction to perform the two tests.
>
> ... the district court impeded and obstructed Cooper's attorneys at every turn as they sought to develop the record. The court imposed unreasonable conditions on the testing the en banc court directed; refused discovery that should have been available as a matter of course; limited testimony that should not have been limited; and found facts unreasonably, based on a truncated and distorted record.

App. 310.

Had Cooper been given a full and fair opportunity to conduct discovery and pursue his claims in the

district court, the record in this case with respect to his actual innocence claim would have looked quite different. Without discovery, barred from meaningful input into the testing, and denied the ability to present witnesses who could shed light on who the real culprits were, Cooper nevertheless introduced significant new evidence that showed his innocence. Answers to questions such as what discovery should be permitted in successor petitions, what leeway should be given to permit meaningful testing, and what evidence should be permitted at evidentiary hearings would give meaningful guidance to lower courts dealing with actual innocence claims.

C. The Circuits And The District Courts Require Guidance About Whether To Apply The Standard In *Schlup*, In AEDPA, Or In *Brady*.

1. The Current Standard for Evaluating Claims of Actual Innocence in Second or Successive Petitions is Unclear.

a) This Court's rule in *Schlup*

In *Schlup*, this Court articulated the standard for evaluating new evidence of actual innocence in a second or successive habeas corpus petition in which petitioner also raises claims of constitutional violations at trial. 513 U.S. 298, 301 (1995). Petitioner in *Schlup* presented new evidence of his innocence, in addition to raising an ineffective assistance of counsel claim and a claim under *Brady*. *Id.* at 307. Petitioner's constitutional claims were procedurally defaulted because he could not

establish why they were not raised in his initial federal habeas petition. *Id.* at 315. This Court, however, found that if petitioner demonstrated that "it is *more likely than not* that no reasonable juror would have convicted him in light of the new evidence," he would be entitled "to have his otherwise barred constitutional claims considered on the merits." *Id.* at 315-16, 327, citations omitted (emphasis added).

In articulating the "more likely than not" standard, this Court explained that in this "narrow class of cases," failure to provide relief from default would implicate a "fundamental miscarriage of justice." *Schlup*, 513 U.S. at 314. If a petitioner presents strong evidence of innocence, the court cannot have confidence in the outcome of the trial unless that trial was also free of non-harmless constitutional error. Thus, where such a showing of innocence is made, petitioner must be granted the opportunity to prove those claims of error. *Id.* at 316.

b) Second or successive petitions under § 2244(b)

On April 24, 1996, President Clinton signed into law the AEDPA, which includes provisions governing claims presented in a second or successive habeas petition. 28 U.S.C. § 2244(b).

Read literally, § 2244(b)(2)(B)(i) requires all claims presented in a second or successive habeas petition to satisfy the due diligence requirement without exception or excuse. In addition, § 2244(b)(2)(B)(ii) might be said to raise the *Schlup*

"more likely than not" standard to one of "clear and convincing evidence." Nothing in the statute, however, addresses the concerns raised by this Court in *Schlup*, or addresses how courts are to evaluate petitions that allege new evidence of actual innocence, in addition to underlying constitutional error at trial.

2. The Circuits Require Guidance with Respect to Which Standard Applies.

Since the enactment of § 2244(b)(2), the circuit courts have evaluated evidence of actual innocence in conjunction with claims of constitutional error at trial in second or successive petitions in inconsistent ways. One circuit has ruled that § 2244(b)(2) supersedes *Schlup*. *See Jordan v. Dep't of Corrections*, 485 F.3d 1351, 1353 (11th Cir. 2007). Other circuit decisions have applied both § 2244(b)(2) and *Schlup*. *See, e.g., Goldblum v. Klem*, 510 F.3d 204, 205 (3d Cir. 2007). Still other courts have conflated their analysis of innocence claims such that it is often difficult to determine what test they are applying. *See, e.g., Lott v. Bagley*, 569 F.3d 547 (6th Cir. 2008). The inconsistent and confusing approaches taken by the circuit courts demonstrate the importance of the question presented, and the need for this Court to resolve the issue and continue to protect those narrow class of cases, initially identified in *Schlup*, which implicate a fundamental miscarriage of justice. *Schlup*, 513 U.S. 298, 315 (1995).

a) Certain circuits have taken the position that § 2244(b) supersedes *Schlup*.

In *Jordan*, the Eleventh Circuit refused to apply the *Schlup* analysis. 485 F.3d at 1353. Petitioner alleged an actual innocence claim based on declarations from two witness stating that they saw someone other than the petitioner commit the crime. Petitioner also testified that his confession was the result of police coercion. *Id.* The district court dismissed the petition, stating that the coercion claim was procedurally barred because petitioner knew of the facts underlying the coercion at the time of trial, and that he therefore failed the due diligence requirement under § 2244(b)(2)(B)(i).

On appeal, the Eleventh Circuit affirmed, finding that the language of § 2244(b)(2) plainly required the dismissal of any claim that failed to meet its requirements. *Id.* at 1357.

The court rejected petitioner's argument that he did not have to meet the requirements because his evidence of innocence allowed him to pass through the *Schlup* gateway, and thereby overcome any procedural hurdles. *Id.* It found that § 2244(b) was enacted after *Schlup* and that the court had "neither the power nor the inclination to turn back the clock and pretend that the AEDPA was not enacted ... It was enacted, and its provisions govern second or successive petitions." *Id.* at 1358-1359.

The Eleventh Circuit's analysis in *Jordan* demonstrates that there are circuits that have abandoned the *Schlup* analysis in favor of a literal

reading of § 2244(b)(2). *Jordan* itself highlights the danger in this approach. The petitioner had evidence of innocence – information from newly discovered witnesses attesting to the fact that another person was responsible for the murder. Petitioner paired this new evidence of actual innocence with a claim of constitutional violation at trial – his coerced confession. This is precisely the type of procedural innocence claim contemplated in *Schlup*. But absent the *Schlup* gateway, petitioner had no means to have the evidence of his innocence considered. *Jordan*, 485 F.3d at 1358-59. Such an analysis can result, as it did here, in a potentially innocent person never having his newfound evidence of otherwise defaulted constitutional claims considered on the merits.

b) Other courts have continued to apply *Schlup*.

Other circuits have continued to apply *Schlup*. For example, in *Goldblum*, petitioner presented in a second federal habeas petition new evidence of actual innocence and raised claims of ineffective assistance of counsel and destruction of evidence. 510 F.3d at 210-11. The district court dismissed the petition finding that his claims had either already been presented in his first habeas petition or that they did not satisfy the requirements of § 2244(b)(2). *Id.* at 211. On appeal, the Third Circuit agreed that petitioner's claims were barred under § 2244(b)(2). *Id.* at 214. Following this finding, however, the court nevertheless evaluated petitioner's claims under *Schlup*. In looking at the new evidence presented by petitioner, including testimony about

blood spatter and a confession from someone else involved in the crime, the court concluded that it was not more likely than not that no reasonable juror would have convicted petitioner, and that he had therefore failed to satisfy the gateway requirements of *Schlup*. *Id.* at 226. While petitioner's petition was dismissed, the Third Circuit's approach demonstrates that some circuit courts are still applying the *Schlup* gateway regardless of the outcome under §2244(b)(2), and view *Schlup* as an exception to § 2244(b)(2)'s strict requirements.

c) Even those courts applying both *Schlup* and § 2244(b)(2) are not clear in their reasoning.

As noted above, the Ninth Circuit has declined to decide whether *Schlup* or § 2244(b)(2) applies, and analyzed this case under both standards. Even when applying both § 2244(b)(2) and *Schlup*, however, some courts have not been entirely clear in their reasoning. For example, in *Lott*, petitioner presented evidence of prosecutorial misconduct in his second federal habeas petition that was known by his attorney years before the filing of the successive habeas petition. 569 F.3d at 549. The Sixth Circuit found that petitioner failed to meet the due diligence requirement of § 2244(b)(2)(B)(i) and did not analyze whether petitioner would have met the clear and convincing standard of § 2244(b)(2)(B)(ii). *Id.* The court stated, however, that "*Even if* he were able to meet the due diligence requirement of § 2244, [petitioner] has been unable to advance facts that establish it is *more likely than not* that he is actually innocent..." *Id.* at 549

(emphasis added). Thus, the court appeared to reject petitioner's *Schlup* actual innocence claim.

The language used by the Sixth Circuit highlights the confusion surrounding the interplay of *Schlup* and § 2244(b). The court's use of the phrase "*Even if* he were able to meet the due diligence requirement..." suggests that satisfaction of the due diligence requirement of § 2244(b)(2)(B)(i) is a prerequisite to the "more likely than not" analysis under *Schlup*. The *Schlup* gateway, however, does not include a due diligence requirement. In fact, based on this Court's ruling in *Schlup*, satisfying the *Schlup* gateway removes any procedural bars, and allows a petitioner to have his claims heard on the merits. Given this, it appears that the correct language should have been, "*Despite the fact that* [petitioner] cannot meet the due diligence requirement of § 2244...he is entitled to have his claim of actual innocence considered independently under the *Schlup* standard." While ultimately the Sixth Circuit found that petitioner met neither the standard of § 2244, nor that of *Schlup*, the language used by the court demonstrates that a confusion exists with respect to the two standards.

3. The Circuit and District Courts Also Require Guidance About how to Treat Successor Petitions that Include Claims Under *Brady v. Maryland*.

While a successor petition alleging innocence raises questions regarding whether the standard in *Schlup* or § 2244(b) applies, the questions multiply when a successor petition raises claims under *Brady*.

According to its legislative history, the AEDPA was enacted to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Rep. No. 104-518, at 111 (1996). As noted above, under a strict application of § 2244(b), a petitioner with a *Brady* claim in a successor petition must demonstrate that there is "clear and convincing" evidence that, but for the *Brady* violation, "no reasonable factfinder would have found him guilty of the underlying offense."

This "clear and convincing" standard is quite different, and clearly more onerous than the traditional *Brady* test. According to well-established precedent, a *Brady* claim has three essential components: (1) "the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching," (2) "that evidence must have been suppressed by the State," and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Under this standard, once a defendant can determine that previously unknown exculpatory evidence exists, and can prove its materiality, he is entitled to relief if there is a "reasonable probability of a different result" if the evidence had been available at trial. *See Banks v. Dretke*, 540 U.S. 668, 699 (2004); *United States v. Bagley*, 473 U.S. 667, 682 (1985).

However, applying § 2244(b) raises the constitutional standard from a "reasonable probability of a different result" to require an accused to show there is "clear and convincing" evidence that no reasonable factfinder would have

found the defendant guilty. This higher standard punishes an accused for something beyond his control – the failure of the government to meet its constitutional duties – simply because the evidence did not come to light earlier.

Given this, some courts have expressed reluctance to apply § 2244(b)(2)'s "clear and convincing" standard where the government has withheld material exculpatory evidence until well after trial. In such a situation, delay in asserting a claim is not the result of anything in petitioner's control, and to punish him or her by applying the heightened standard only provide the government with a perverse incentive to suppress evidence for a longer period of time, a result which does not further the intent of Congress in passing the AEDPA. Given this tension between § 2244(b)(2) and *Brady*, a conflict among the circuits has arisen. Some circuits have suggested that an exception to § 2244(b)(2) should exist for *Brady* violations and others have not.

a) The Ninth and Tenth Circuit decisions

In *U.S. v. Lopez*, __ F.3d __, 2009 WL 2501886 (9th Cir. Aug. 18, 2009), the Ninth Circuit faced the question whether the AEDPA standard in §2255(h), a mirror provision to §2244(b)(2)(b), applies to all *Brady* claims. Relying on this Court's jurisprudence in *Panetti v. Quarterman*, 551 U.S. 930 (2007), the court reasoned that:

> Given the nature of *Brady* claims, petitioners often may not be at fault for failing to raise

> the claim in their first habeas petition. It is the prosecutor who violates *Brady's* disclosure obligations by not providing favorable evidence to the defense, and prosecutorial error may not surface until the petitioner's first habeas petition has already been resolved.

Id. at *8. The court further stated:

> If § 2255(h) applies literally to every second-in-time *Brady* claim, federal courts would be unable to resolve an entire subset of meritorious *Brady* claims: those where petitioner can show the suppressed evidence establishes a reasonable probability of a different result and is therefore material under *Brady*, but cannot, under §2255(h)(1)'s more demanding prejudice standard, show that the evidence establishes by clear and convincing evidence that no reasonable juror would have voted to convict.

Id. at *9. Because the petitioner in *Lopez* was unable to establish the materiality of his *Brady* allegations, however, the court dismissed his petition, and did not reach the question of whether to consider meritorious *Brady* claims under the pre-AEDPA abuse of the writ doctrine.

The Tenth Circuit has found a different way to deal with this question, while answering it in a similar way. In *Douglas v. Workman*, 560 F.3d 1156, 1187 (10th Cir. 2009), a key witness testified at the separate trials of two men, Powell and Douglas. The witness later recanted his identification of Powell

and Douglas, stating that the prosecutor had promised him a deal in return for testimony. The new information came to light before Powell filed his first federal habeas petition, but after the district court had already decided Douglas's first petition. The Tenth Circuit upheld the district court's decision to treat Douglas's *Brady* claim as a supplement to his initial petition, rather than as a claim in a successor petition. *Id.* at 1171. The court acknowledged that it was through "no fault of his own" that Douglas had not been able to include the *Brady* claim in his first petition. *Id.* The court recognized the impact that the § 2244(b) standard would have on Douglas's petition, as it based its decision in part on the "inequality in treatment between Mr. Douglas and Mr. Powell" that would result, leading to the conclusion that application of the death penalty to Douglas in this case would be "capricious." *Id.* at 1194. The court further acknowledged that Congress had enacted AEDPA to "reduce delays in the execution of state and federal sentences, promote judicial efficiency, and conserve judicial resources," but emphasized that on the facts of the case, "any delay, inefficiency, or waste of judicial resources stems from the prosecution, not Mr. Douglas." *Id.*

b) Contrary decisions in the Fourth and Eleventh Circuits

The Fourth and Eleventh circuits have applied the more stringent AEDPA standard to situations where *Brady* evidence is not discovered until after an initial petition has been filed. In *Evans v. Smith*, 220 F.3d 306 (4th Cir. 2000), petitioner argued that

this Court's decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), exempted him from meeting the heightened requirements of § 2244(b).[3] He argued that, as in *Stewart* and *Slack*, his claims were not ripe for adjudication until after the first petition had been filed. The Court disagreed and found that standards of §2244(b) "account for precisely the type of situation Evans alleges." *Evans*, 2202 F.3d at 323.

In *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257 (11th Cir. 2009), the Eleventh Circuit held that all second-in-time *Brady* claims are subject to the AEDPA. The court found that *Brady* claims are routinely raised in initial habeas petitions, and that such violations "occur, if at all, at trial or sentencing and are ripe for inclusion in a first petition." *Id.* at 1260.

---

[3] In *Stewart*, the Court addressed whether the AEDPA's gatekeeping provisions applied to an incompetent-to-be-executed claim. The district court had dismissed the claim as premature in the first petition and petitioner later moved to reopen the claim. 523 U.S. at 640. This Court held that, although the claim was second in time, it was not subject to AEDPA: "[t]here was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe." 523 U.S. at 643. In *Slack*, the Court held that a habeas petition "filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition." 529 U.S. at 486.

c) Reasons for this Court to decide this issue

The opinions of the various circuits raise a host of important questions for this Court. Does holding that, based on AEDPA, *Brady* claims must be raised and adjudicated in a first petition for writ of habeas corpus misplace the constitutional burden? If the onus is placed on the defense to discover the *Brady* evidence and raise the *Brady* violation in a first petition, instead of on the government to disclose the evidence at the appropriate time, does that pass constitutional muster? If a petitioner must assert all *Brady* claims in his first petition or risk losing the benefit of the constitutional standard, is it now the defense's duty to seek justice from the prosecution, rather than the prosecution's duty to seek justice for society?

This Court should decide whether applying the heightened standard of § 2244(b) to *Brady* claims in successor petitions advances the policies of the AEDPA where the government has successfully concealed evidence until after a first federal habeas petition has been decided. Should the AEDPA be interpreted to curtail a defendant's rights based on the government's failure to meet its constitutional and ethical duties?

The prosecutor "is the representative ... of a sovereignty whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78,88-89 (1935). Furthermore, "[t]he right to a fair trial, guaranteed to state criminal defendants by

the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure "that 'justice shall be done' " in all criminal prosecutions." *Cone v. Bell*, 129 S.Ct. 1769, 1772 (2009). As this Court has said, "[h]e may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Id.* Applying a heightened burden to a *Brady* claim therefore implicates whether a defendant's due process rights under the Fourteenth Amendment had been violated. This issue is of vital importance today, as recent scholarship has questioned whether the Constitutional rights embodied in *Brady* have been degraded and whether the government has been meeting its *Brady* obligations. *See* Stephanos Bibas, "*The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward The Search for Innocence?*" Paper 81, Scholarship at Penn. Law (2005) (*Brady* "has meant much less in practice than it could have. Few potential *Brady* claims come to light, and fewer defendants walk free, because our system remains an adversarial contest rather than a neutral inquiry into innocence."). As the Court recently noted, "[a] rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

David Todd Alexander, Esq.
332 Sheridan Avenue
Piedmont, CA 94611
Telephone: (650) 387-4382
Facsimile: (510) 654-3773

Norman C. Hile
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
400 Capitol Mall
Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7900
Facsimile: (916) 329-4900

APPENDIX A

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

KEVIN COOPER, PETITTIONER-APPELLANT v. JILL L. BROWN, WARDEN, CALFORNIA STATE PRISON AT SAN QUENTIN, RESPONSEND-APPELLEE.	No. 05-99004.

December 4, 2007

RYMER, Circuit Judge:

Kevin Cooper appeals the district court's denial of his third federal petition for a writ of habeas corpus. Sitting en banc, we held that Cooper made out a *prima facie* case that entitled him to file a second or successive application; authorized ***874** him to file it; and remanded for the district court to order that two tests be performed so that "the question of Mr. Cooper's innocence can be answered once and for all." *Cooper v. Woodford*, 358 F.3d 1117, 1124 (9th Cir.2004). The two tests were a mitochondrial test of blond hairs found in one of the victim's hands, and a test for the presence of the preservative agent EDTA on a bloody T-shirt that was not part of the prosecution's case at trial but that Cooper specifically asked, on appeal, to have tested. On

remand, the district court conducted the mitochondrial DNA testing on the hairs and EDTA testing on the T-shirt. The results do not show Cooper's innocence. The court also held extensive evidentiary hearings at which forty-two witnesses testified with respect to all issues encompassed in Cooper's third application. In a 159-page ruling that comprehensively addresses each of the claims, then-Chief United States District Judge Marilyn L. Huff denied the petition on the merits and, alternatively, on the ground that Cooper's claims in the successive petition are procedurally barred. Order Denying Successive Petition for Writ of Habeas Corpus (May 27, 2005) (Order) (attached as Appendix A).

Cooper sought, and we provisionally granted, a Certificate of Appealability (COA) on whether the district court abused its discretion by denying discovery, necessary forensic testing, evidentiary hearings, and a request to expand the record; whether he is entitled to relief on his claims of actual innocence, that the state contaminated or tampered with key evidence, that the state failed to disclose material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that Josh Ryen's testimony was unreliable; and whether he demonstrated multiple constitutional errors without which the jury would have returned a not guilty or non-capital verdict. We leave the COA in place, but we see no abuse of discretion in any respect and we agree with, and adopt, the district court's analysis on each of the claims.

Accordingly, we affirm.

I.

Cooper was convicted of the first-degree murders of Franklyn Douglas Ryen, Peggy Ryen, his wife, Jessica Ryen, their 10-year old daughter, and Christopher Hughes, an 11-year old neighborhood friend of Joshua Ryen, the Ryen's 8-year old son who was brutally assaulted but lived. Following his conviction, Cooper was sentenced to death.

Cooper escaped from the California Institute for Men (CIM), a state prison, on Thursday, June 2, 1983, and hid out in a vacant house (the Lease house) next door to the Ryens' residence on Thursday night, all day Friday, and Friday night before the murders on Saturday night, June 4. Using a hatchet or axe and a knife that came from the Lease house, Cooper hacked to death Doug, who had 37 separate wounds, Peggy, who had 32 separate wounds, Jessica, who had 46 wounds that included carving on her chest, and Christopher, who had 26 wounds. Cooper inflicted chopping wounds to the head, and stabbing wounds to the throat, of Joshua. Christopher's father found the bodies late Sunday morning.

The facts are set out in meticulous detail in the district court's order. Order at 892-917; 954-61. Suffice it to summarize here that Cooper admitted staying in the Lease house; a blood-stained khaki green button identical to buttons on field jackets issued at the state prison from which Cooper escaped was found on the rug at the Lease house; tests revealed the presence of blood in the Leases' shower and bathroom sink; hair found in the bathroom sink

was consistent with that of Jessica and Doug *875 Ryen; a hatchet covered with dried blood and human hair that was found near the Ryens' home was missing from the Lease house, and the sheath for the hatchet was found in the bedroom where Cooper had stayed; Cooper's semen was found on a blanket in the closet of the Lease house; one drop of blood (A-41) that belongs to an African-American male, which Cooper is, was found on the wall of the Ryen hallway opposite where Jessica was found and post-trial DNA testing confirms that Cooper is the source of A-41; plant burrs found inside Jessica's nightgown were similar to burrs from vegetation between the Lease house and the Ryen house, and to burrs found on a blanket inside the closet where Cooper slept at the Lease house, and in the Ryen station wagon, which was missing when the bodies were discovered but turned up, abandoned, in Long Beach; two partial shoe prints and one nearly complete one found in or near the Ryens' house and in the Lease house were consistent both with Cooper's shoe size and Pro-Keds Dude tennis shoes issued at CIM that Cooper did not deny having; a hand-rolled cigarette butt and "Role-Rite" tobacco provided to inmates at CIM was in the Ryens' vehicle, and similar tobacco was in the bedroom of the Lease house; and a hair fragment found in the Ryen station wagon was consistent with Cooper's pubic hair. Cooper checked into a hotel in Tijuana about 4 o'clock on Sunday afternoon.

The district court's order likewise recounts the procedural history from Cooper's February 19, 1985 conviction. Order at 15696-703. In sum: the judgment of conviction and sentence was affirmed by

the California Supreme Court, which observed that the "sheer volume and consistency of the evidence is overwhelming," *People v. Cooper*, 53 Cal.3d 771, 837, 281 Cal.Rptr. 90, 129, 809 P.2d 865 (1991), and the United States Supreme Court denied a petition for certiorari, *Cooper v. California*, 502 U.S. 1016, 112 S.Ct. 664, 116 L.Ed.2d 755 (1991). Cooper's first federal petition, subsequently amended and supplemented, was filed August 11, 1994, and denied August 25, 1997; we affirmed, *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir.2001) (*Cooper I*); and his petition for a writ of certiorari was denied, 537 U.S. 861, 123 S.Ct. 238, 154 L.Ed.2d 100 (2002). Cooper filed a second federal petition on April 20, 1998, which we construed as an application for authorization to file a second or successive petition and denied. *Cooper v. Calderon*, 274 F.3d 1270 (9th Cir.2001) (*Cooper II*). He sought to file another successor petition that involved DNA testing and tampering, which we denied, *Cooper v. Calderon*, No. 99-71430 (9th Cir. Feb. 14, 2003, April 7, 2003) (orders). Meanwhile, Cooper filed seven petitions in the California Supreme Court together with a writ of mandate and various motions, a habeas petition in the San Diego County Superior Court, and six other petitions for a writ of certiorari in the United States Supreme Court as well as two petitions for habeas corpus, each of which was denied. Cooper's February 2, 2004 petition to the California Supreme Court raised similar claims to those asserted in this application; that court denied all claims on the merits on February 5, 2004, and also denied as untimely those having to do with evidence tampering, failure to disclose exculpatory evidence,

submission of false testimony to the jury, and offering Joshua Ryen's unreliable testimony. On February 6, 2004, Cooper filed another application to file a successive application, which was initially denied, *Cooper v. Woodford*, 357 F.3d 1019 (9th Cir.2004), *withdrawn*, 357 F.3d 1054 (9th Cir.2004), but was later granted after this court sua sponte decided to rehear the application en banc, *Cooper v. Woodford*, 357 F.3d 1054 (9th Cir.2004). En banc, we authorized Cooper's third habeas petition to be filed, ***876** and stayed execution pending resolution of this application. *Cooper*, 358 F.3d at 1124 (*Cooper III*).

The district court denied the petition and denied Cooper's request for a COA. Judgment was entered on May 31, 2005. When Cooper then filed a request for a COA in this court, we allowed the appeal to go forward conditioned upon further consideration once briefing was completed. The state asks that we withdraw the COA, but we decline to do so. 28 U.S.C. § 2253(c); *Miller-El v. Cockrell*, 537 U.S. 322, 335-37, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). This means that Cooper has leave to assert that even though the district court allowed the testing that we ordered, it abused its discretion in how the tests were conducted and in the scope of the evidentiary hearings that it held; and to appeal denial of claims one through four (actual innocence, contamination or tampering with evidence, *Brady* violations, and unreliability of Joshua Ryen testimony), and six through nine (unlawful destruction of bloody coveralls, ineffective assistance of counsel for failing to present evidence of another person's confession, ineffective assistance of counsel in failing to connect the bloody coveralls to Lee Furrow, ineffective

assistance of counsel in failing to introduce evidence that victims were clutching hair in their hands, and denial of constitutional rights by cumulative law enforcement errors and misconduct) of his third petition.

II.

Standards of review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) are well-known and are fully set out in the district court's order. *See* Order at 917-22. However, the framework for analyzing an actual innocence "gateway" claim under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), remains unsettled. There is a question whether such a claim is governed by the *Schlup* standard itself, or by the AEDPA conditions for filing a second or successive application, 28 U.S.C. §§ 2244(b)(2)(B)(i) and (ii).[1]

---

[1] To make a successful claim under *Schlup*, "a petitioner must show that in light of all the evidence, including new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir.1997) (en banc).

For authorization to file a second or successive application for habeas corpus under AEDPA, a petition must show that

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §§ 2244(b)(2)(B)(i) and (ii). *See Cooper III*, 358 F.3d at 1119 (discussing the differences but finding it unnecessary to decide which standard applies).

Cf. *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064, 2078, 165 L.Ed.2d 1(analyzing a *first* habeas petition seeking consideration of defaulted claims based on a showing of actual innocence under *Schlup* rather than AEDPA). However, this need not detain us for Cooper fails to meet either standard.

Beyond this, a district court's decision to exclude expert testimony is reviewed for an abuse of discretion. *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1191 (9th Cir.2007). "The trial court has wide discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results." ***877** *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir.1988) (citations omitted). The determination whether an expert witness has sufficient qualifications to testify is reviewed for an abuse of discretion. *United States v. Abonce-Barrera*, 257 F.3d 959, 964(9th Cir.2001).

We also review a district court's decision to permit or deny discovery in habeas proceedings for an abuse of discretion. *Bittaker v. Woodford*, 331 F.3d 715, 728 (9th Cir.2003) (en banc). Such discovery is available only "for good cause."[2] *Hayes v. Woodford*, 301 F.3d 1054, 1065 n. 6 (9th Cir.2002). "We review for an abuse of discretion the district court's denial of an evidentiary hearing and the scope of an evidentiary hearing held." *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir.2004).

---

[2] Rule 6(a) of the Rules Governing Section 2254 Cases provides:

(a) A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.

III.

We first consider issues that relate to whether the district court abused its discretion as Cooper contends it did in denying discovery, failing to order forensic testing, limiting what he could show at evidentiary hearings, and refusing to expand the record on certain claims. Many of these issues are interwoven with the merits of claims one through four and six through nine, but Cooper raises discrete procedural challenges that we treat separately as best we can because, if the district court did not abuse its discretion in these procedural rulings, we agree with its other determinations. Necessarily there is overlap; to the extent there is, and reference to the district court's discussion on the merits is helpful to understanding its procedural rulings, we incorporate (without repeating) its analysis.

A.

Cooper complains that the district court denied the bulk of his discovery requests, but focuses on only three of them:[3] his request for photographs and documentation of the examination and testing of the bloodstained T-shirt, blood drop A-41, and the

---

[3] Cooper's briefing mentions other requests, *e.g.*, for discovery related to instructions to investigating authorities at the time of the murders to stop pursuing evidence pointing to someone other than Cooper, and of the notes of San Bernardino Sheriffs Department (SBSD) investigators who, after the third petition was filed, investigated employees and patrons of the Canyon Corral Bar on the night of the murders. However, he develops no argument with respect to them and we deem appeal as to these denials, and others, abandoned.

cigarette butts V-12 and V-17; San Bernardino Sheriffs Department (SBSD) files reviewed by Deputy Derek Pacifico after Cooper filed his third habeas petition as part of an investigation into whether CIM Warden Midge Carroll had or had not contacted SBSD before trial with *Brady* information regarding shoeprint evidence; and his request for test data of Dr. Gary Siuzdak, one of the EDTA testing experts selected by the court, when Siuzdak withdrew his results after discovering EDTA contamination in his laboratory. Cooper offers only a sketchy explanation why denying these requests, without prejudice, abused the court's discretion. We discern no basis for concluding that it did.

The state produced materials relating to the post-conviction DNA testing in 2001 and these materials were also exhibits in the evidentiary hearing conducted by the district court. We cannot see how denying discovery as to these materials mattered at all.

Warden Carroll's January 30, 2004 declaration stated that she had learned before *878 trial-and had communicated to one of the lead detectives on the Cooper case-that the shoes CIM carried were not specially designed prison-issue shoes and were common shoes available to the general public through Sears and other such retail stores.[4] Because

---

[4] Although the district court cited a phone slip with the name of "Midge Carroll" dated 9/19/83 and two pages of notes from trial counsel David Negus's files, its determination does not depend upon proof that Negus knew about Carroll's investigation of the tennis shoes. There was, therefore, no need for Cooper to have been allowed to expand the record to correct this error, if any.

the en banc court was persuaded that a *Brady* violation appeared to be indicated, *see Cooper III*, 358 F.3d at 1120-21, the district court set an evidentiary hearing to address Cooper's claim that the prosecution failed to disclose Carroll's information. It heard testimony from Carroll; Lt. Donald Smith, a former investigator at CIM under Carroll; Don P. Luck, a former executive and sales manager for Stride Rite Corporation, the company that manufactured the Pro-Keds Dude tennis shoe; and Sandra Coke, the defense investigator who obtained declarations from Carroll, James Taylor, a CIM inmate who testified at trial that he gave Pro-Keds Dude tennis shoes to Cooper, and Detective Derek Pacifico of SBSD.[5] Carroll's files about Cooper's escape and the murder investigation were also in evidence. They are extremely detailed and include records of telephone conversations; however, they contain no indication that she spoke with the SBSD about tennis shoes worn by CIM inmates. In part for this reason, the court did not abuse its

---

For this reason, the court neither abused its discretion nor ignored the truth, as Cooper contends, in denying his Motion to Expand the Record Pursuant to Rule 7.

[5] Carroll was, of course, known to Cooper from day one. She had contact with defense investigators before and after trial. Carroll's availability to Cooper would not necessarily derogate the state's affirmative *Brady* obligation to disclose material exculpatory information that it knew about, but her accessibility does highlight the lack of any meaningful connection between the breadth of Cooper's request and the possibility of adducing favorable, material information that would tend to exculpate him. It is unlikely that the SBSD would have thought itself capable of suppressing information that Carroll herself could easily have provided to Cooper.

discretion in concluding that Cooper's request for all SBSD files reviewed by Pacifico was unjustified by the possibility that Pacifico's review may have overlooked SBSD documents reflecting a communication that Carroll's own detailed files do not show. In addition, the prosecution's theory was not that Pro-Keds Dude shoes were limited to prison inmates (the Stride Rite records introduced at trial showed distribution to other government institutions), but that there was a link between the imprints found at and near the Ryen house and in the Lease house to Cooper, who never denied having a pair of Pro-Keds Dude shoes. Contracts from Stride Rite that were in evidence at trial show that CIM purchased 1,390 Pro-Keds Dude shoes. Carroll herself had no personal knowledge whatsoever about the availability of the tennis shoes at CIM or elsewhere. Thus, even if she had called SBSD as her declaration avers, all that she could have communicated was her *belief* that Pro-Keds Dude shoes weren't available at CIM but were available at places like Sears-which is both mistaken and immaterial. Consequently, her communication could not have had any appreciable bearing on a *Brady* claim. Cf. *Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir.2005) (noting that discovery under Rule 6(a) should not be denied if it is essential to develop fully a petitioner's claim).

Finally, the court acted within its discretion in denying access to Dr. Siuzdak's ***879** data. His EDTA test results did not reflect the expected results from the PBS buffer reagent blank control and so were unreliable. Contamination was not remarkable, as laboratories use EDTA in testing. As

Suizdak's results were unreliable, they could not be used to prove Cooper's tampering claim.

B.

Cooper contends that the district court's testing protocol for the bloody T-shirt was flawed in five respects: (1) while the court facially complied with the en banc order allowing only Cooper to select a stain from the T-shirt for limited anti-clotting agent testing, it refused to allow presumptive blood testing to determine whether the stain tested was even a blood stain; (2) it did not allow his experts, Dr. Peter DeForest and Dr. Kevin Ballard, to view the T-shirt as a first step in designing the protocol; (3) it accepted at face value Dr. Gary Siuzdak's retraction of his EDTA testing results; (4) it denied testing for anti-clotting agent migration; and (5) it denied testing for other anti-clotting agents such as citric acid that were used to preserve Cooper's blood. He also maintains that while the district court facially complied with this court's order to perform mitochondrial DNA testing to determine whether hairs at the crime scene belonged to a third party perpetrator, the testing ignored the recommendation of Dr. Edward Blake to evaluate unexamined groups of hair. As a result, Cooper submits, a large group of hairs was never examined for anagen roots (roots that indicate the hair was pulled instead of having been cut or broken), and thus hairs in that group were never considered for testing. He also argues that the Cooper DNA against which the hairs were examined was contaminated and therefore could not prove that he was a possible source of the hairs. We

disagree that the district court abused its discretion in conducting either test.

The district court held a tutorial on mitochondrial DNA and EDTA testing at which experts for Cooper and the state testified. At the tutorial, Cooper's expert, Dr. Terry Melton, explained that mitochondrial testing cannot be used effectively to identify the source of hairs, but rather is primarily an exclusionary method as it determines only whether a hair shares maternal DNA with a particular individual. The court developed a protocol and ordered that ten hairs suitable for testing from Jessica's hands be tested for mitochondrial DNA and that two hairs (one found on Doug Ryen's hand and one on Chris Hughes's arm) identified in 2001 as having anagen roots also be tested. Dr. DeForest, Cooper's criminalist, selected the hairs. Two proved to be animal hairs, and tests on the remaining hairs could not exclude Jessica, Peggy, Josh or their maternal relatives as donors. Therefore, the results of mitochondrial DNA tests did not indicate that these hairs were pulled out of the head of a third party perpetrator.

With respect to testing the T-shirt for the purpose of determining whether the blood, previously associated with Cooper's DNA, had been planted, the district court developed the EDTA protocol over a three-month period and after extensive input from counsel and the experts. Upon the parties' recommendation, the court also adopted a "control" method of testing in which the amount of EDTA detected in a stain would be compared to the amounts of EDTA found in various control swatches

and from other non-stained portions of the T-shirt. Pursuant to the protocol, the stain was to be extracted by Dr. DeForest and shipped to Dr. Ballard and Dr. Suizdak for double-blind EDTA testing. After the test results were submitted, the parties proposed a protocol for DNA testing to determine whether the main stain fabric cut-out from the EDTA testing contained Cooper's blood. From the results of that ***880** testing, Cooper could not be excluded as a contributor of the DNA extracted from the cut-out, while Peggy Ryen, Jessica Ryen, Josh Ryen, Doug Ryen and Chris Hughes were each eliminated as a possible contributor. The court ultimately concluded that EDTA testing lacks sufficient indicia of reliability to be admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). However, the court alternatively found that Dr. Ballard's results disprove Cooper's theory of tampering because Cooper's theory requires a high level of EDTA presence in the blood, but the EDTA level in the stain with blood was actually lower than that of most of the control areas. *See* Order at 933-50 (describing process and making EDTA findings).

Turning to Cooper's contentions about testing of the T-shirt, we note at the outset that it is immaterial whether the EDTA tests were flawed or not because the district court had discretion to conclude that EDTA testing does not meet *Daubert* standards. "In *Daubert*, the Court set out four factors to be reviewed when applying Rule 702:(1) whether the theory or technique can be or has been tested, (2) whether the theory or technique has been

subjected to peer review, (3) whether the error rate is known and standards exist controlling the operation of the technique, and (4) whether the theory or technique has gained general acceptance."[6] *United States v. Benavidez-Benavidez*, 217 F.3d 720, 724 (9th Cir.2000). There is no evidence in the record that application of mass spectrometry to forensic analysis of blood evidence to determine EDTA levels can be or has been tested. The technique has been offered to courts only twice before; in one case, there was no challenge to the EDTA evidence and in the other, Dr. Ballard, as well as the EDTA testing that he was to perform, were rejected by the court. EDTA testing has not been subjected to peer review and there has been no discussion of forensic EDTA testing in scientific literature since a 1997 article that headlines the need for a better analytical method. In short, for reasons explained in detail by the district court, Order at 942-48, EDTA testing has not gained general acceptance in the scientific community.

---

[6] Federal Rule of Evidence 702 governs admissibility of scientific evidence in federal district court. *Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1055 (9th Cir.2003). It provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Regardless, Cooper fails to explain why additional inspection of the T-shirt was necessary, for an appropriate stain and controls were selected after 6G, the stain that was initially selected, proved unavailable because it had already been consumed. Dr. DeForest did not participate in this selection because he had removed himself, but Cellmark-a laboratory that Cooper agreed was highly qualified-replaced him to conduct the extraction. No basis appears in the record to question selection of the stain that was used, and Cooper points to none on appeal. Dr. Maddox of Cellmark and the state's expert, Steven Myers, selected an area between two stains designated "6J" and "6K," each of which had earlier been found to be blood containing primarily Cooper's DNA.

*881 Nor does any reason appear why Dr. Suizdak's representations should not have been accepted at face value; the testing he was to undertake was double-blind, he is a well respected scientist, and he had no interest in the outcome.

Cooper never asked for presumptive blood testing before the protocol was implemented, which is sufficient reason to reject his argument on appeal; in any event, as DNA analysis on the tested area later confirmed that Cooper could not be excluded as a contributor of the DNA extracted from the cut-out, there is no point to his complaining now about the lack of presumptive testing. Likewise, Cooper articulated no concern before the test results were in about the possibility that EDTA could have migrated from the selected stain. Regardless, if his post-hoc migration theory were correct, it would be

theoretically impossible to achieve meaningful results from further testing as there is no way to determine whether the background EDTA levels throughout the shirt are higher than normal for there is no "normal" base level of EDTA.

Finally, Cooper's suggestion that testing for *other* anti-clotting agents such as citric acid should have been allowed is misplaced as the only occasion where his blood was preserved in a tube containing citric acid was when it was drawn by the San Quentin Prison, not by the SBSD, and the only blood sample of Cooper's to which the SBSD had access was drawn into a tube containing EDTA as a preservative. Further testing on the T-shirt was, therefore, not required.

Neither was the mitochondrial DNA testing deficient as Cooper argues. By way of background, Cooper's forensic expert (Dr. Blake) and Department of Justice criminalist Steven Myers spent six days in 2001 jointly conducting visual and microscopic examination of approximately 1000 hairs recovered from the victims' bodies in order to identify hairs that had properties of hair pulled from the skin. Only hairs with anagen roots can be used to identify an assailant because only they, as contrasted with a cut or broken hair, can indicate that the victim may have pulled the perpetrator's hair in a struggle. Three hairs meeting the experts' criteria were identified, but nuclear DNA testing of these hairs yielded no human DNA. Responsive to the en banc ruling, the district court allowed Cooper's criminalist to select up to 10 hairs from those removed from Jessica's hands for mitochondrial DNA testing. No

anagen hairs were identified and the 10 hairs selected were tested along with the two remaining hairs subjected to nuclear DNA testing in 2001. The results show that Jessica, Peggy, and Josh Ryen could not be excluded as the source of the hairs in Jessica's hands.

Cooper contends that the court turned its back on its "own expert's" view that hair testing must be designed to ensure that it is complete and thorough, but the premise is faulty on two accounts. First, the expert referred to-Dr. Blake-was not the court's expert, as Cooper characterizes him; he was *Cooper's* expert in state court and has been throughout the federal proceedings, and did not become otherwise solely on account of his appointment by the court for the purpose of assuring adequate compensation. More importantly, Dr. Blake did not recommend that *every* hair be examined, as Cooper suggests. To the contrary, Blake testified that "[t]he only reason to go through this process one more time is simply to be much more rigorous and detailed in the survey, should that be deemed to be a useful thing to do." He never opined that it *would be* useful or reasonable.

Cooper's argument that his blood sample was contaminated is beside the point. The hairs were never examined to see if ***882** they came from *Cooper*, and there has never been any evidence or suggestion to that effect. Rather, Cooper's theory was that the hairs came from *a third party*, that is, from the real killer, and if this could be shown, then the presence of a third party at the scene would prove his innocence. That is why the en banc court ordered mitochondrial testing. *See* 358 F.3d at 1124

(noting that mitochondrial testing of the blond or light brown hair in Jessica Ryen's hand, if favorable to Cooper, could positively identify Lee Furrow or perhaps others as the killer or killers). Thus, even if Cooper's sample were contaminated, it is irrelevant.

C.

Cooper maintains that the district court refused to allow him to present evidence related to the three suspicious men in the Canyon Corral Bar. This is belied by the record. *See* Order at 961-69. He points to exclusion of Al Warren, a bartender who was not present on the night of the murders, for whom his only proffer was that Warren was "presumably" privy to discussion of the incident. Having heard from the bartender who was on duty (Edward Lelko), the manager, the waitress who served the three men drinks, two patrons who saw the three men, another waitress who was working that night, a bouncer, and others who frequented the Canyon Corral, the court had discretion to decline to hear another bar employee who was not percipient. Cooper also points to limited inquiry into witness tampering with Lance Stark. Stark testified that before the evidentiary hearing, he was approached by an individual wearing a white, short sleeve shirt and driving a white, unmarked Ford Crown Victoria with a computer extending out from the dashboard on an arm, whom he believed to be a member of law enforcement and who made it clear that it would be in Stark's best interest not to talk about the Cooper case. However, the court had discretion to find that Cooper's request for further inquiry would be a wild goose chase as Cooper had no license plate or other

information that might lead to the driver, and to conclude that it would be unlikely to produce anything of probative value. Stark testified, so the incident did not inhibit him and even if it were law-enforcement related as he speculates, it would have no tendency to prove what happened at the Canyon Corral Bar.

Cooper also submits that the court improperly refused to allow him to examine Daniel Gregonis, the SBSD criminalist responsible for examining and testing several items of evidence including the bloodstained T-shirt, blood drop A-41, and the cigarette butts V-12 and V-17. However, Cooper was given an evidentiary hearing in state court in 2003 to present evidence of his tampering claims, and Gregonis testified and was examined by Cooper's counsel. He had an opportunity to develop a record, and the district court was not obliged to provide another one.

The same is true to the extent Cooper contends that further testing is needed in general to show that these items, blood spots identified as the "UU Series," and a blood sample drawn from him at the time of his arrest (VV-2) were tampered with. Each claim is procedurally barred and, in addition, both the tampering with the UU Series claim and the planting of cigarette butts claim have been previously adjudicated. *See, e.g., Cooper v. Calderon*, No. 92-CV-427H at 41, 50-51. As we have explained, it doesn't matter to any of Cooper's claims whether his blood sample (VV-2) was contaminated or not; it wasn't used for anything material.

Cooper also insists that the fact that the size of one of the cigarettes (V-12) changed by 3 millimeters after having been unrolled for testing demonstrates tampering, but his position was rejected by ***883** the San Diego County Superior Court after an evidentiary hearing and Cooper has not overcome the deference due that determination under 28 U.S.C. § 2254(d). The first measurement (4 mm) was of a "butt," whereas the second measurement (7 mm) is one of two dimensions given for "burned paper in box 7x7 mm." It is clear that the second measurement is of *unrolled paper*, whereas the first measurement is of the *rolled butt*. That the dimensions would be different is self-evident, and the difference in no way calls into question the state court's finding or requires further inquiry at this stage.

Cooper continues to assert that the bloody T-shirt is connected to at least one of the perpetrators and that the district court limited the evidence he was allowed to develop and present to show tampering. This goes nowhere for reasons we have just explained. Nor did the district court abuse its discretion in not allowing Cooper to recall Dr. Ballard to clarify the reliability of his testing methods, to state that he could test for other anti-clotting agents, and to testify to the reliability of his laboratory; or to cross-examine experts with respect to anti-clotting agent testing; or to cross-examine Dr. Suizdak and Dr. Lewis Maddox, who prepared the stain solutions for testing. To the extent relevant and helpful, ample opportunity for expert input and consultation was afforded.

Cooper also faults the district court for refusing to permit him to pursue examination of informant Albert Anthony Ruiz, who testified at an evidentiary hearing on August 6, 2004, about what he might have heard from sources other than law enforcement in San Bernardino County. The asserted relevance was to Cooper's *Brady* claim that the prosecution failed to disclose evidence from Ruiz that law enforcement was ordered to plant evidence inculpating Cooper. We see no abuse of discretion, as Ruiz did not work for and had no dealings with SBSD and had no direct information about the investigation. All that he could possibly have learned was secondhand public information recounted by Jim Parsons, a deputy with the Riverside County Sheriff's Department who submitted a declaration himself and who, in any event, had no involvement in the Cooper case or knowledge of it beyond what he read in the papers or saw on television. In light of this, the court committed no error in excluding information that was hearsay and speculation as well as immaterial to SBSD's *Brady* obligations.

Cooper's contention that the district court improperly refused to allow him to uncover and present evidence regarding daily logs and a blue shirt listed on the log for June 6, 1983, fails as no evidence contradicts the state's submission that the log was available to Cooper before trial. Cooper's counsel represented to the trial judge that he had the daily logs. The issue could, and should, have been pursued long before now. *See* Order at 994-97.

Cooper argues that he was precluded from fully exploring his tennis shoe claims by the court's

refusal to allow him to review the records Pacifico reviewed and to send written questions to Michael Newberry, who worked for Stride Rite Corporation and testified at trial that Stride Rite had a contract with CIM for Pro-Keds Dude tennis shoes that were not available in retail stores. We have already explained why the court did not abuse its discretion in declining to order discovery into all the SBSD files reviewed by Pacifico, and Cooper makes no proffer why questions to Newberry would shed any light on the contracts which were, themselves, in evidence, or on distribution of the Pro-Keds Dude shoe as to which there is no substantial dispute-except for Carroll's unfounded belief.

Cooper also complains that he was not allowed to cross-examine Josh Ryen in *884 connection with Claim Four, which asserts that Josh's testimony at trial was altered and unreliable. As the district court found, the facts and circumstances surrounding Josh Ryen's statements and how they were presented to the jury have been known for twenty years. The jury heard two taped statements pursuant to the parties' stipulation: a videotape of an interview on December 9, 1984 when Cooper's counsel and the prosecutor questioned Josh under oath, and an audiotape of a December 1, 1983 interview with Dr. Lorna Forbes, Josh's treating psychiatrist. He did not identify an assailant in either one, but said on the one hand that three Hispanic workers visited the ranch the day of the murders, and on the other that he saw a single man with a "puff" of hair standing over his mother. On April 22, 2005, the district court allowed Josh Ryen, along with Christopher Hughes's parents, to make a statement about their views of the matter as

victims.[7] Cooper argues that he should have been allowed an evidentiary hearing because the April 22, 2005 statement (during which Josh Ryen recalled a man with "bushy" hair) was a "third version" that further proves the manipulation, and unreliability, of the trial version. We disagree that the court abused its discretion.[8] Even accepting Cooper's position that Josh Ryen's April 22, 2005 statement satisfies the requirements for an evidentiary hearing in § 2254(e)(2) because the latest version could not have been discovered earlier, § 2254(e)(2)(B)[9]

---

[7] This was after the close of evidence. The district court allowed Hughes and Josh Ryen an opportunity to make a statement consistent with Congress's intent in The Justice For All Act, Pub.L. No. 108-405, § 102, 118 Stat. 2260, 2261-62 (2004), that victims be heard.

[8] Aside from noting that the jury never heard Josh's recollection of a man with bushy hair, the district court did not base its Claim Four determination on anything that Josh said in his victim statement. Rather, it found that the defense was benefited at trial by the taped presentations because Josh Ryen did not identify his assailant, the jury heard his earlier statement that three Hispanic workers had been at the ranch, and the stipulation avoided the sympathy factor of having Josh present on the stand. It concluded that deference was due to the state court's determinations and, as Cooper has known about Josh's somewhat inconsistent versions since the murder, he failed to exercise due diligence in developing the factual predicate for a new evidentiary hearing. *See* Order at 14878-79; 28 U.S.C. § 2254(e)(2).

[9] In relevant part, 28 U.S.C. § 2254(e)(2)(B) provides that an evidentiary hearing shall not be held on a claim unless it relies on a factual predicate that could not have been previously discovered through the exercise of due diligence, and

nevertheless applies to bar relief as the jury knew that Josh Ryen had given somewhat inconsistent accounts yet convicted Cooper anyway. We cannot conclude that no reasonable juror would have convicted Cooper knowing that Josh Ryen now recalls a man with bushy hair.

Finally, Cooper maintains that the district court purported to make credibility determinations of witnesses based solely on documents. Even if this weren't allowed (which it is, in appropriate circumstances), he points to no instances where this happened.

Accordingly, there is no basis to remand for examination and more testing of the evidence, or additional evidentiary hearings, as Cooper urges.

IV.

The district court denied Cooper's claim of actual innocence after detailing *885 the DNA evidence that shows he is the donor of the DNA extracted from the drop of blood found in the hallway outside the Ryen master bedroom (A-41), saliva from the hand-rolled and manufactured cigarette butts (as used at CIM) found inside the abandoned Ryen station wagon, and blood smears on the T-shirt found near the Canyon Corral Bar (even though it was not used to establish Cooper's guilt at trial); explaining why Cooper's challenge to the DNA

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

evidence is unavailing; reviewing prior court findings that document overwhelming evidence of guilt; and considering the testimony from forty-two witnesses and numerous exhibits introduced at evidentiary hearings held after remand. Order at 950-84.

Cooper argues the district court was incorrect in light of substantial evidence of third party perpetrators in the Canyon Corral Bar and Albert Anthony Ruiz's testimony. That he didn't do it, Cooper suggests, is bolstered by his showing of alternative suspects through the Kenneth Koon confession and information concerning Lee Furrow and his bloody coveralls. We disagree, for reasons stated by the district court. *See* Order at 980-82; 983-84.

We agree with the district court's conclusion that all of Cooper's challenges "have come back the same: there is overwhelming evidence that Petitioner is the person guilty of these murders." Order at 15854. Considering all the evidence, new and old, Cooper has not shown that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 327, 115 S.Ct. 851; *see House*, 126 S.Ct. at 2076-78 (explaining the *Schlup* standard). Thus, Cooper meets neither *Schlup's* gateway nor AEDPA's.[10] It

---

[10] In addition to finding that most of Cooper's allegations relate to evidence that was already presented at trial and previously rejected, and that the remainder rest on unreliable or incorrect information and source, the court concluded that Cooper did not meet his burden under 28 U.S.C. § 2244(b), which requires a factual claim not discoverable through due diligence that

follows that Cooper has not met *Herrera's* standard for actual innocence. *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

V.

In discussing Cooper's procedural challenges, we have already indicated why he is not entitled to relief on his claim that the state contaminated or tampered with the evidence with respect to examination and testing of the T-shirt and the blood spot (A-41). The T-shirt, of course, was not used as evidence against Cooper so it is difficult to see how it could have had any inculpatory effect. Post-conviction, however, it has become the center of attention. *See, e.g., Cooper III*, 358 F.3d at 1124(observing that this case centers on Cooper's claim that he is innocent, and quoting his argument that with EDTA testing " 'the question of Mr. Cooper's innocence can be answered once and for all'"); *id.* (Silverman, CJ, concurring in part and dissenting in part) (noting that "[e]verything comes down to the bloody t-shirt"). The San Diego County Superior Court took evidence on the tampering claim and found none, and the California Supreme Court denied Cooper's petition for writ of mandate on the issue. EDTA testing turned up nothing to indicate tampering.

---

establishes by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty, or under § 2254(d), which requires that the state court's decision be contrary to or an unreasonable application of clearly established federal law.

There was neither visible blood remaining on the paint chips comprising A-41 nor control areas around the blood sample for *886 purposes of determining if there is a significant difference between the amounts of EDTA in the stain compared with areas surrounding it. Accordingly, for reasons it explained that are well-founded in the record, the district court concluded that A-41 is not able to be reliably tested for the presence of EDTA. Order at 948-50. This leaves in place the finding of the state court that no tampering occurred. Cooper offers no convincing evidence why that finding is not correct and entitled to deference.

To the extent his appeal extends beyond these items, we also agree with the district court's analysis that Cooper's claims of evidence tampering and withholding lack merit. *See* Order at 997-1000.

VI.

Cooper argues that the district court's analysis of his *Brady* claims was contrary to clearly established federal law as set forth in *Kyles v. Whitley*, 514 U.S. 419, 435-36 & n. 10, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), in that it analyzed each *Brady* claim individually without analyzing their cumulative effect. We agree with the district court's analysis with regard to the state's alleged withholding and manipulation of evidence related to shoe-prints found in the Ryen home and hideout house, the bloody coveralls, the blue shirt, and the Canyon Corral Bar. As there is no individual *Brady* violation, there are no violations to cumulate.

Apart from what we have already discussed, the district court held an evidentiary hearing to evaluate Cooper's claim that he discovered in 1998 a disposition report initialed "KS" that contradicted Deputy Frederick Eckley's trial testimony that on his own, he had destroyed the coveralls that Diana Roper gave him. After considering the testimony of Eckley and Deputy Ken Schreckengost (the "KS" of "KS") and evaluating their credibility, the court found that Eckley did act on his own in destroying the coveralls without discussing it with Schreckengost. So, as the district court held, the disposition report does not cast doubt on Eckley's testimony or undermine the prior findings and conclusions of the California Supreme Court or the district court's own determination that the coveralls were not material exculpatory evidence in Cooper's case. Order at 987-89. We are not firmly convinced this finding is wrong.

The district court rejected Cooper's contention that the prosecution failed to disclose that a police officer was present at the Canyon Corral Bar on the night of the murders based on extensive testimony about what actually happened that night and what it viewed as the more credible version of those events. Cooper's argument on appeal is insubstantial and leaves us without a firm conviction that the district court erred. As there was no police presence at the bar on the night of the murders, there was no evidence for the prosecution to suppress.

Cooper additionally alludes to the fact that Detective Timothy Wilson had information that three suspicious men were seen in the bar, which he

passed on to the sergeant in charge of the Ryen/Hughes investigation but which the prosecution failed to disclose to Cooper. However, Cooper offers no suggestion why this information undermines confidence in the verdict. It was no secret that three strangers were at the bar. The district court found that the more credible version of events came from employees and patrons interviewed shortly after the murders who testified at trial. In any event, none of the witnesses casts doubt on the physical evidence of Cooper's guilt. As the court's exhaustive recital of all the Canyon Corral evidence-both that adduced at trial and at the evidentiary hearing-shows, *see* Order at 961-69, rumors that Wilson picked up from *887 word on the streets could not have been exculpatory, impeaching or material.

VII.

The district court noted that the jury heard two taped statements of Joshua Ryen, pursuant to stipulation, that benefited the defense because he did not identify his assailant, had earlier indicated that three Hispanic workers had been at the ranch, and was not on the stand to garner sympathy. The court deferred to denial of Cooper's constitutional claim on the merits by the California Supreme Court pursuant to 28 U.S.C. § 2254(d), and found that Cooper had not demonstrated that, but for constitutional error, no reasonable juror would have found him guilty if Josh Ryen had been subjected to testifying at trial. Order at 999-1001. We agree.

VIII.

Cooper's initial briefing posits that he is entitled to relief on his claim that SBSD unlawfully destroyed the bloody coveralls, and on his claims that trial counsel rendered ineffective assistance in failing to present evidence of another person's confession to the murders, failing to connect the bloody coveralls to Lee Furrow, and failing to introduce evidence that victims were clutching hair in their hands. He pursues none of these claims in reply. Each has been adjudicated previously in one forum or another. And we are in accord with the district court's treatment of all these claims. *See* Order at 980-85.

IX.

Our conclusion that Cooper prevails on none of his claims moots his last submission, that his conviction and sentence were infected by multiple constitutional errors without which the jury would have returned a not guilty or non-capital verdict. As the district court, and all state courts, have repeatedly found, evidence of Cooper's guilt was overwhelming. The tests that he asked for to show his innocence "once and for all" show nothing of the sort.

AFFIRMED.

McKEOWN, Circuit Judge, concurring:

I.

I concur in the opinion but am troubled that we cannot, in Kevin Cooper's words, resolve the question of his guilt "once and for all." I do not fault the careful and extensive review by the district court or the multiple levels of appeal carried out under statutory and Supreme Court standards. Rather, the state bears considerable responsibility in making such resolution unavailable. I separately concur to underscore the critical link between confidence in our justice system and integrity of the evidence.

Significant evidence bearing on Cooper's culpability has been lost, destroyed or left unpursued, including, for example, blood-covered coveralls belonging to a potential suspect who was a convicted murderer, and a bloody t-shirt, discovered alongside the road near the crime scene. The managing criminologist in charge of the evidence used to establish Cooper's guilt at trial was, as it turns out, a heroin addict, and was fired for stealing drugs seized by the police. Countless other alleged problems with the handling and disclosure of evidence and the integrity of the forensic testing and investigation undermine confidence in the evidence. As the Supreme Court observed in *Kyles v. Whitley*, "[w]hen, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will

diminish it." 514 U.S. 419, 446 n. 15, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

The legitimacy of our criminal justice system depends on the "special role played by the American prosecutor in the search for truth in criminal trials." *Banks v. Dretke*, 540 U.S. 668, 696, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). The same principle extends to the police and their investigatory work in supporting the prosecution. Of course we don't demand or expect perfection. But we expect full disclosure, competency in the investigation, and confidence in the evidence. To be sure, sometimes the prosecution is hampered by sloppy police work. And sometimes inept investigation and disclosure by the police colors the prosecution. But, the obligation of the prosecutor to disclose evidence favorable to the defense serves to "justify trust in the prosecutor as 'the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" ***1005***Kyles*, 514 U.S. at 439, 115 S.Ct. 1555(quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).

Despite the presence of serious questions as to the integrity of the investigation and evidence supporting the conviction, we are constrained by the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(b)(2)(b). The only exception potentially applicable in Cooper's case requires Cooper to present facts that "could not have been discovered previously through the exercise of due diligence,"

and that, if proven, and "viewed in light of the evidence as a whole, would be sufficient to establish by *clear and convincing evidence* that, but for constitutional error, *no reasonable factfinder* would have found [Cooper] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(emphases added).

In light of this demanding statutory barrier, I agree that Cooper has failed to qualify for relief. Nonetheless, I write separately to draw attention to the illustrative troubling circumstances involving the alleged state mishandling of evidence. The forensic evidence in this case is critical and yet was compromised.[1] These facts are all the more troubling because Cooper's life is at stake.

II.

Following are illustrative examples of evidentiary gaps, mishandling of evidence and suspicious circumstances.

DESTRUCTION OF BLOODY COVERALLS

During the pre-trial investigation, a woman named Diana Roper phoned police to report a pair of bloody coveralls left at her house by her then-

---

[1] Other evidence, such as the eye witness testimony, was wide-ranging and contradictory. For example, following the murders, Josh initially signaled that three men were his attackers. He also signaled that they were not black or dark-skinned. Later, he saw Cooper on television and said that Cooper was not the attacker and that he had never seen Cooper, an observation he also shared with his grandmother. A year and a half later, Josh testified that Cooper had done the killing.

boyfriend, Lee Furrow. Roper told police that Furrow may have been involved in the Ryen-Hughes murders. Furrow's hatchet was missing from his tool belt after the murders, and Roper also reported erratic behavior and remarks that aroused her suspicion.

According to Roper and her sister, on the day after the murders, Furrow showed up in a car that matched the description of the Ryens' station wagon. Roper also explained that Furrow bragged about his three rules "to follow anytime you do a crime:" "wear gloves, never wear your own shoes and never leave a witness alive."

In the face of this potential link between Furrow and the murders, and despite being a convicted murderer, Furrow was never pursued as a suspect. *See, e.g., Allen v. Woodford*, 395 F.3d 979, 986 (9th Cir.2005) ("When Furrow and Kitts were finally left alone, Furrow began to strangle Kitts, only to be interrupted by a phone call.... Furrow then strangled Kitts to death ... tie[d] stones to Kitt's wrapped-up body and ... [threw] it into a canal.").

The coveralls were turned over to a detective, but case investigators did not follow up. The homicide division did not return phone calls. Then, before completion of the preliminary hearing, the detective threw the coveralls away in a dumpster. Although the destruction of the coveralls was known at trial and was pursued during Cooper's first federal habeas petition, the destruction of evidence was claimed to be the misguided act of a single officer. Only later, long after the trial, did the defense

discover previously ***1006** undisclosed documentary evidence to the contrary-a police department memorandum confirming destruction of the coveralls, signed by a higher ranking supervisory officer. Destruction of bloody coveralls from a potential suspect is not an inconsequential forensic gaffe.

THE MISSING SHIRT

Although two suspicious and potentially bloodied t-shirts were apparently turned over to the police and logged in as evidence during the murder investigation, only one of these-a yellow t-shirt-was disclosed to the defense. However, the police logged in a second, possibly blood-covered shirt and recorded it as a *blue* shirt. The blue shirt was not produced to the defense and reference to the shirt was only found when, post-conviction, defense counsel was combing through later-discovered police logs.

In yet another investigative contradiction, the state now claims that the blue t-shirt was actually the yellow t-shirt that was properly disclosed. However, the woman who found the shirt on the side of the road not far from the crime scene and who reported the blue t-shirt remembers it as blue. The written log clearly reflects a blue t-shirt, and separately notes a yellow t-shirt.

The district court concluded that the log reflecting the blue t-shirt was produced to the defense earlier, and hence the blue t-shirt did not constitute new evidence. Cooper claims the page in

question is not stamped in the same format as the other police log pages produced in pre-trial discovery. No explanation is provided for this discrepancy. Even had the page been produced, the t-shirt itself was undeniably never produced. Has the t-shirt gone the way of the destroyed coveralls? Is the blue t-shirt really the yellow t-shirt? How could a shirt described as blue become yellow? Once again, bungled records and bungled investigative work obscure the truth.

BLOOD DROP A-41

Blood drop A-41 is the most controversial and crucial aspect of the state's case, yet it was handled carelessly from the time it was first acquired. To begin, no one actually remembers finding A-41; everyone claims that someone else pointed it out.

When originally tested, Cooper's blood type was identified as Type B, and subsequently A-41 was identified as Type B. Soon after, it came to light that Cooper's blood type was actually RB, and then A-41 was determined to be RB as well. One criminologist changed his testimony regarding the depletion of the sample. The criminologist originally thought he ran low on the blood stored inside a small pill box, but later more "appeared" to him that he claimed not to have seen initially. In 1991, the Supreme Court of California determined that after the final pre-trial tests on A-41, the sample was "completely consumed." *People v. Cooper*, 53 Cal.3d 771, 281 Cal.Rptr. 90, 809 P.2d 865, 878 (1991).

Criminologist Daniel Gregonis, who tested Cooper's blood, saliva and semen, is alleged to have repeatedly mishandled the biological evidence both pre- and post-trial. Evidence points to the fact that Gregonis broke the seal on A-41 in 1999, potentially contaminating it, and conducted testing of unknown source evidence specimens by placing them alongside the samples drawn from Cooper. In state court, Gregonis testified that he did not open the glassine envelope containing A-41 during the time it was in his unsupervised custody. However, photographic evidence reveals that A-41 was opened and resealed with the initials DJG (Daniel John Gregonis) and the date "8/13/99," which was during the period that the sample was checked out to Gregonis. After trial, Gregonis*1007 also allegedly checked out and mislaid a sample of Cooper's saliva. On several other occasions, Gregonis altered his laboratory notes and changed his testimony about laboratory testing. The chain of custody of the blood sample is also in question due to mishandling by Gregonis.

To make matters worse, the manager of the San Bernadino Sheriff's Crime Laboratory was a heroin addict during the time period in question and was later dismissed from his employment for allegedly stealing heroin from the police evidence cache. As in *House v. Bell*, "the evidentiary disarray" and the "limited rebuttal of it in the present record, would prevent reasonable jurors from placing significant reliance on the blood evidence." 547 U.S. 518, 126 S.Ct. 2064, 2083, 165 L.Ed.2d 1 (2006). Resting Cooper's conviction on the DNA evidence, which was not before the jury, is particularly problematic

because of the extensive evidence documenting the mishandling of the evidence.

THE WIDE AVAILABILITY OF KEDS SHOES

The Keds tennis shoes are perhaps the most damning evidence against Cooper. As the prosecution stated in its opening statement, the shoes "were supplied strictly for prison use within the state of California and unavailable through retail stores in California." However, we now know that the Keds shoes believed at trial to be issued only to prison inmates were actually provided by various government entities, including the Forest Service, Navy, and state hospitals, and were available through retail catalogs.

In district court, Cooper produced a catalog, not before the jury in 1985, that demonstrated that the shoes were available for retail sale. According to Cooper, the widespread availability of the shoes *was known to the prosecution at the time of trial*, as it had been reported by the warden of the minimum security prison from which Cooper escaped. But the prosecution failed to disclose this evidence. Before trial, the warden reported to a lead investigator that the notion that the shoes were prison-issue only was inaccurate and that the shoes were commercially available to the public through Sears Roebuck and other retail outlets. Cooper's trial attorney confirmed that at the time of trial he was "not aware the Pro Keds Dude tennis shoes were listed for sale in a retail catalogue" and that had he known this information he "would have featured that fact prominently in the defense at trial."

The habeas process does not account for lingering doubt or new evidence that cannot leap the clear and convincing hurdle of AEDPA. Instead, we are left with a situation in which confidence in the blood sample is murky at best, and lost, destroyed or tampered evidence cannot be factored into the final analysis of doubt. The result is wholly discomforting, but one that the law demands.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KEVIN COOPER, PETITTIONER-APPELLANT v. JILL L. BROWN, WARDEN, CALFORNIA STATE PRISON AT SAN QUENTIN, RESPONSEND-APPELLEE.	D.C. No. CV-04-00656-H.

May 27, 2005

By Marilyn L. Huff, District Judge, Presiding

Order Denying Successive Petition
for Writ of Habeas Corpus

Petitioner Kevin Cooper, a California state prisoner, brings this successive petition for writ of habeas corpus petition pursuant to 28 U.S.C. § 2254. He challenges his capital conviction for the first-

degree murders of Franklyn Douglas Ryen ("Doug"), Peggy Ryen, his wife, Jessica Ryen, their 10-year-old daughter, and Christopher Hughes, an 11-year-old neighborhood friend, and the attempted murder of Joshua Ryen, the 8-year-old son of Doug and Peggy Ryen.

Petitioner's successive petition challenges post-conviction DNA test results that confirm that Petitioner is responsible for the Ryen/Hughes murders. (DOJ Physical Evidence Report dated July 2, 2002; Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.)[1] These DNA tests were done pursuant *888 to a Joint DNA Forensic Testing Agreement ("Joint DNA Agreement") entered on May 10, 2001.[2] Those results provide strong evidence of Petitioner's DNA from blood inside the Ryen residence (one in 310 billion), from saliva on two cigarette butts recovered from the stolen Ryen station wagon (one in 19 billion and one in 110 million), and from a T-shirt found on the side of a road that contained Petitioner's blood (one in 110 million) and victim Doug Ryen's blood (one in 1.3 trillion). (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) In addition to

---

[1] (92-CV-427, Third Supplemental Notice of Lodgment ("NOL") filed Jan. 23, 2004, Ex. No. 4, DOJ Physical Evidence Exam Report dated July 2, 2002 ("DOJ Physical Evidence Report dated July 2, 2002"); 92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. No. 5, Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 ("Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002").)

[2] (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. No. 23, Joint Forensic DNA Testing Agreement dated May 10, 2001.)

the DNA evidence inculpating Petitioner, DNA profiles of blood taken from a hatchet that was taken from the house where Petitioner hid after his escape from prison matched that of several of the victims including Doug and Jessica Ryen and Chris Hughes. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.)

On February 9, 2004, the Ninth Circuit granted Petitioner's request to file a successive petition for writ of habeas corpus in federal court and remanded the successive petition to this Court. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir.2004). The Ninth Circuit stated that Petitioner's guilt may be resolved through two scientific tests: (1) mitochondrial DNA testing of hairs found on the victims and (2) testing of the T-shirt for ethylene-diamine tetra-acedic acid ("EDTA") blood preservative. *Id.* at 1123-24. Having conducted mitochondrial DNA testing and EDTA testing, reviewed the parties' papers, heard testimony from forty-two witnesses, reviewed numerous exhibits, considered the prior record, and listened to the parties' oral arguments, this Court DENIES the successive petition for writ of habeas corpus.

PROCEDURAL HISTORY

On February 19, 1985, Petitioner was convicted of four counts of first-degree murder (Cal.Penal Code § 187(a)) of Doug Ryen, his wife Peggy Ryen, their 10-year-old daughter Jessica Ryen and a neighborhood friend, 11-year-old Christopher Hughes. Petitioner was also convicted of attempted murder in the first degree (Cal.Penal Code §§

664,187(a), 12022.7) of the Ryens' eight-year-old son Joshua, the severely wounded sole survivor. Petitioner also pled guilty to escape from a state prison. (Cal.Penal Code § 4530(b).) The jury found true an allegation of the special circumstance of multiple murders, (Cal.Penal Code § 190.2(a)(3)), as well as the allegation that Petitioner intentionally inflicted great bodily injury on the sole survivor, Joshua Ryen (Cal.Penal Code § 12022.7). The jury determined the penalty as death. On May 15, 1985, the trial court sentenced him to death.

On May 6, 1991, the California Supreme Court affirmed the judgment of conviction and sentence of death. *People v. Kevin Cooper*, 53 Cal.3d 771, 281 Cal.Rptr. 90, 809 P.2d 865 (1991). On June 26, 1991, the California Supreme Court denied Petitioner's petition for rehearing and issued its remittitur. On December 16, 1991, the United States Supreme Court denied Petitioner's first petition for writ of certiorari. *889 *Cooper v. California*, 502 U.S. 1016, 112 S.Ct. 664, 116 L.Ed.2d 755 (1991).

On March 24, 1992, Petitioner requested appointment of counsel and a stay of execution from this Court. On March 26, 1992, the first in a series of stays of execution was issued by this Court. *Cooper v. Calderon*, Case No. 92-CV-427 ("*Cooper I*").

On August 11, 1994, Petitioner filed his first petition for writ of habeas corpus in this Court. *Cooper I*, 92-CV-427. On April 12, 1996, Petitioner filed an amended petition for writ of habeas corpus in this Court. *Cooper I*, 92-CV-427, Doc. No. 123. On June 20, 1997, Petitioner filed a supplemental

petition for writ of habeas corpus with this Court. On August 25, 1997, following an evidentiary hearing, this Court denied Petitioner's first federal petition for writ of habeas corpus. *Cooper I,* 92-CV-427, Doc. No. 165. On September 16, 1997, Petitioner filed a motion and objections to the entry of judgment in this Court. *Cooper I,* 92-CV-427, Doc. No. 202. The Court denied Petitioner's motion on November 7, 1997. *Cooper I,* 92-CV-427, Doc. No. 208.

On April 4, 1996, Petitioner filed his first of seven state petitions for writ of habeas corpus in the California Supreme Court. *In re Cooper*, Case No. S052741. The California Supreme Court denied the first petition for writ of habeas corpus on February 19, 1997. (Answer, Ex. 1.)

On March 12, 1997, Petitioner filed a motion to recall the remittitur in the direct appeal in the California Supreme Court. *People v. Cooper*, Case No. S004687. The California Supreme Court denied Petitioner's motion to recall the remittitur on March 26, 1997. (Answer, Ex. 2.)

On September 12, 1997, Petitioner filed his second state petition for writ of habeas corpus in the California Supreme Court. (Answer, Ex. 3.) On September 30, 1997, Petitioner filed his second motion to recall the remittitur in the California Supreme Court, which was denied October 15, 1997. (Answer, Ex. 4.)

On April 26, 1998, during the pendency of his appeal to the Ninth Circuit Court of Appeals from

this Court's denial of his first federal habeas petition, Petitioner filed a second petition for writ of certiorari in the United States Supreme Court in case number 97-8837 regarding this Court's denial of his first federal petition for writ of habeas corpus. On June 26, 1998, the United States Supreme Court denied the petition. *Cooper v. Calderon*, 524 U.S. 963, 118 S.Ct. 2392, 141 L.Ed.2d 757 (1998).

On April 30, 1998, Petitioner filed a second federal petition for writ of habeas corpus in this Court. *See Cooper v. Calderon*, Case No. 98-CV-818 ("Cooper II"). On June 15, 1998, this Court dismissed Petitioner's second petition for writ of habeas corpus for lack of jurisdiction and as impermissibly successive under 28 U.S.C. 2244(b)(1). *Cooper II*, 98-CV-818, Doc. No. 3. On June 25, 1998, Petitioner filed a motion in this Court to alter or amend the judgment dismissing his second federal petition for writ of habeas corpus. This Court denied the motion on June 30, 1998. *Cooper II*, 98-CV-818, Doc. No. 6.

On December 23, 1998, Petitioner filed his third state petition for writ of habeas corpus in the California Supreme Court. *In re Cooper*, Case No. S075527. On March 15, 1999, Petitioner filed a supplemental petition for writ of habeas corpus in the California Supreme Court in his third state habeas proceeding. *In re Cooper*, Case No. S075527. On March 26, 1999, while his third state habeas petition *890 was still pending, Petitioner filed a fourth state habeas corpus petition in the California Supreme Court. *In re Cooper*, Case No. S077408. On April 14, 1999, the California Supreme Court denied Petitioner's third and fourth state petitions for writ

of habeas corpus. (Answer, Exs.5, 6.) On May 7, 1999, Petitioner filed a motion for clarification of rulings regarding his third state petition for writ of habeas corpus. The motion was denied on May 12, 1999. (Answer, Ex. 7.)

On July 9, 1999, Petitioner filed a third petition for writ of certiorari in the United States Supreme Court in case number 99-5303, challenging the denial of his third state habeas petition by the California Supreme Court. The United States Supreme Court denied the petition on October 4, 1999. *Cooper v. California*, 528 U.S. 897, 120 S.Ct. 229, 145 L.Ed.2d 192 (1999).

The Ninth Circuit affirmed the Court's denial of Petitioner's first federal habeas petition on July 9, 2001. *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir.2001), cert. denied, 537 U.S. 861, 123 S.Ct. 238, 154 L.Ed.2d 100 (2002). On August 29, 2001, Petitioner filed a petition for rehearing and rehearing en banc. On January 8, 2002, the Ninth Circuit denied the petition.

On December 21, 2001, the Ninth Circuit denied Petitioner's request for authorization to file a second petition for writ of habeas corpus. *Cooper v. Calderon*, 274 F.3d 1270(9th Cir.2001). On February 4, 2002, Petitioner filed a petition for rehearing and rehearing en banc from the denial of authorization to file a second petition. The Ninth Circuit denied Petitioner's request on October 18, 2002. *Cooper v. Calderon*, 308 F.3d 1020 (9th Cir.2002), *cert. denied*, 538 U.S. 984, 123 S.Ct. 1793, 155 L.Ed.2d 677 (2003). On November 21, 2002, the Ninth Circuit

denied Petitioner's motion to reconsider or vacate the order denying his motion to stay the mandate pending the filing of a petition for writ of certiorari and request for en banc review regarding the denial of authorization to file a second federal habeas petition. *Cooper v. Calderon*, Case No. 98-99023.

On April 18, 2002, Petitioner filed his fourth petition for writ of certiorari in the United States Supreme Court in case number 01-10742. This fourth petition challenged the Ninth Circuit's affirmance of this Court's denial of Petitioner's first federal petition for writ of habeas corpus. *See Cooper*, 255 F.3d 1104. On October 7, 2002, the United States Supreme Court denied the petition. *Cooper v. Calderon*, 537 U.S. 861, 123 S.Ct. 238, 154 L.Ed.2d 100 (2002).

On February 11, 2003, Petitioner filed another petition for writ of habeas corpus in the United States Supreme Court in case number 02-9051. *See* Cooper, 274 F.3d at 1272. The United States Supreme Court denied the additional petition for writ of habeas corpus on April 21, 2003. *In re Cooper*, 538 U.S. 976, 123 S.Ct. 1793, 155 L.Ed.2d 696 (2003).

On February 14, 2003, the Ninth Circuit denied Petitioner's authorization to file a third federal petition for writ of federal petition for writ of habeas corpus in the District Court. *Cooper v. Calderon*, Case No. 99-71430. On April 7, 2003, the Ninth Circuit denied Petitioner's petition for rehearing and rehearing en banc from the denial of authorization to file a third federal petition for writ of habeas corpus.

On February 20, 2003, Petitioner filed a fifth petition for writ of certiorari in the United States Supreme Court in case number 02-9050, regarding the Ninth Circuit's denial of authorization to file a second federal habeas petition in this Court. On April 21, 2003, the United States Supreme Court ***891** denied the petition. *Cooper v. Calderon*, 538 U.S. 984, 123 S.Ct. 1793, 155 L.Ed.2d 677 (2003).

On May 15, 2003, Petitioner filed his second petition for writ of habeas corpus in the United States Supreme Court in case number 02-10760. The United States Supreme Court denied the petition on October 6, 2003. *In re Cooper*, 540 U.S. 808, 124 S.Ct. 92, 157 L.Ed.2d 254 (2003).

On June 13, 2003, the San Diego County Superior Court denied Petitioner's petition for writ of habeas corpus. (Answer, Ex. 8.) On October 22, 2002, Petitioner filed a motion seeking post-conviction mitochondrial DNA testing of hairs. On June 16, 2003, Petitioner filed a motion for post-conviction testing of a T-shirt to show evidence tampering by law enforcement personnel. (Answer, Ex. 9.) The Honorable William H. Kennedy of the San Diego County Superior Court held an evidentiary hearing on Petitioner's claim of evidence tampering and request for mitochondrial DNA testing on June 23-25, 2003. Following this post-conviction evidentiary hearing, the San Diego County Superior Court denied Petitioner's motions relating to evidence tampering and post-conviction DNA testing. (Answer, Ex. 9.)

On June 24, 2003, Petitioner filed his fifth state petition for writ of habeas corpus in the California Supreme Court. On October 22, 2003, the California Supreme Court denied the petition. (Answer, Ex. 10.) On July 22, 2003, Petitioner filed a petition for writ of mandate in the California Supreme Court, relating to the denial of his post-conviction DNA motion. *Cooper v. Superior Court*, Case No. S117675. The California Supreme Court denied the motion on October 22, 2003. (Answer, Ex. 11.)

On September 2, 2003, Petitioner filed a third motion to recall the remittitur in the California Supreme Court. *People v. Cooper*, Case No. S004687. On October 22, 2003, the California Supreme Court denied the motion. (Answer, Ex. 12.)

On December 17, 2003, the California Superior Court issued an execution date of February 10, 2004.*(See* Cal.Crim. Case No. 72787 filed Dec. 17, 2003.)

On January 20, 2004, Petitioner filed his sixth petition for writ of certiorari in the United States Supreme Court, in case number 03-8513, challenging the California Supreme Court's denial of his fifth state petition for writ of habeas corpus and an application for a stay. *Cooper v. California* The United States Supreme Court denied the petition and the application for a stay on February 9, 2004. *Cooper v. California*, 540 U.S. 1172, 124 S.Ct. 1197, 157 L.Ed.2d 1225 (2004).

On January 22, 2004, this Court held a telephonic status conference to set an expedited

briefing schedule to allow for meaningful appellate review prior to the impending execution. Petitioner's counsel represented that the filings would not be done in the Southern District of California. Nevertheless, the Court urged the parties to proceed in an expeditious manner to permit an orderly and reasoned review of the issues.

On February 2, 2004, Petitioner filed a complaint in the United States District Court for the Northern District of California, pursuant to 42 U.S.C. § 1983, seeking a temporary restraining order, preliminary injunction, and expedited discovery on a claim that California's use of lethal injection violates the Eighth Amendment. *Cooper v. Rimmer*, Case No. 04-436. On February 6, 2004, the Honorable Jeremy Fogel, United States District Court Judge, issued an order denying the motions for ***892** temporary restraining order, preliminary injunction, and expedited discovery. On February 8, 2004, the Ninth Circuit panel affirmed the district court's order. *Cooper v. Rimmer*, 358 F.3d 655 (9th Cir.2004).

On February 2, 2004, Petitioner filed his sixth petition for writ of habeas corpus and an emergency application for a stay of execution in the California Supreme Court. *In re Cooper*, Case No. S122389. The California Supreme Court denied the petition on the merits on February 5, 2004. (Answer, Ex. 13.)

On February 5, 2004, Petitioner filed a sixth volume of exhibits with the California Supreme Court in support of his sixth state habeas petition after the denial of his sixth petition. On February 6, 2004, the California Supreme Court deemed the

submission a seventh state habeas corpus petition. *In re Cooper*, Case No. S122507. The California Supreme Court denied the seventh state habeas petition on the merits on February 9, 2004. (Answer, Ex. 14.)

On February 6, 2004, Petitioner filed an application for authorization to file a successive petition for writ of habeas corpus in the Ninth Circuit Court of Appeals. *Cooper v. Woodford*, Case No. 04-70578. On February 8, 2004, a three-judge panel denied Petitioner's application for authorization to file a successive petition. On February 7, 2004, Petitioner filed his seventh petition for writ of certiorari with the United States Supreme Court. *Cooper v. California*, 03-8773. The United States Supreme Court denied Petitioner's petition and application for stay on February 9, 2004. *Cooper v. California*, 540 U.S. 1172, 124 S.Ct. 1198, 157 L.Ed.2d 1225 (2004). On February 9, 2004, the Ninth Circuit sua sponte agreed to hear Petitioner's application en banc. *Cooper v. Woodford*, 357 F.3d 1019 (9th Cir.2004). On February 9, 2004, the en banc Ninth Circuit granted Petitioner authorization to file his third habeas corpus petition with this Court. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir.2004).

On March 19, 2004, Respondent filed a petition for writ of certiorari with the United States Supreme Court, challenging the jurisdiction of the en banc court to grant authorization to file a successive petition in this Court. This petition for certiorari was denied on May 17, 2004. Goughnour v. Cooper, Case No. 03-1328.

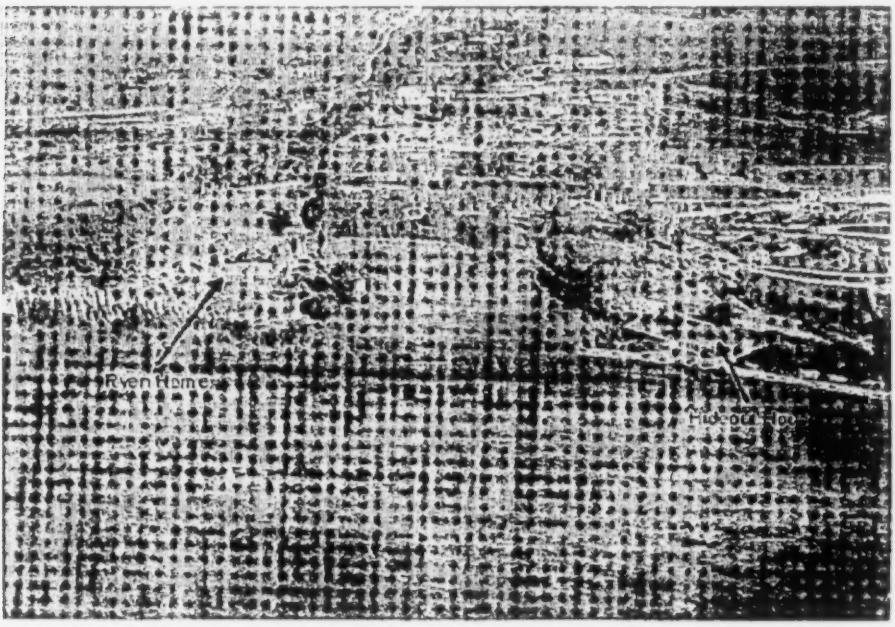
On March 2, 2004, the mandate of the Ninth Circuit issued to this Court regarding the authorization to file a successive habeas petition. On April 2, 2004, Petitioner filed his third petition for writ of habeas corpus with this Court. Between April 2, 2004 and April 1, 2005, the Court ordered mitochondrial DNA testing, EDTA testing, heard testimony from forty-two witnesses, and reviewed numerous exhibits and extensive briefing. On April 22, 2005, the Court heard final argument on the successive petition and denied the petition on the merits, and alternatively, denied the petition on procedural grounds as reflected in this order.

FACTS

Petitioner was sentenced to death for the "massacre of a mother, father, daughter, and houseguest in the sanctity of their home, and the attempted murder of the young son, the only person to survive." *Cooper*, 53 Cal.3d at 793, 281 Cal.Rptr. 90, 809 P.2d 865. "The jury convicted Cooper of hacking to death Franklyn Douglas Ryen (Doug) and Peggy Ryen, their 10-year-old daughter Jessica, and an 11-year-old houseguest, Christopher Hughes (Chris), inside the Ryen home near the California Institute for Men (CIM), a state prison in Chino. Eight-year-old Joshua *893 Ryen (Josh), although severely injured, survived. Two days before this execution of the innocent, defendant had escaped from CIM." *Cooper*, 53 Cal.3d at 794, 281 Cal.Rptr. 90, 809 P.2d 865. The California Supreme Court noted the "sheer volume and consistency of the evidence is overwhelming." *Cooper*, 53 Cal.3d at 837, 281 Cal.Rptr. 90, 809 P.2d 865.

After escaping from CIM prison on June 2, 1983, Petitioner hid in a vacant house owned by Larry Lease and brothers Roger and Kermit Lang ("hideout house") for two-and-one-half days before entering the Ryen house. *Cooper*, 53 Cal.3d at 795-801, 281 Cal.Rptr. 90, 809 P.2d 865; *Cooper*, 255 F.3d at 1107-08; *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 2-3; (*see also* 87 RT 2959-62, 2967-70, 2991.) The hideout house was next door to the Ryen house, just 126 yards away. (4/22/05 Reporters' Transcript of Evidentiary Hearing ("HRT") 60; *Cooper*, 53 Cal.3d at 795, 281 Cal.Rptr. 90, 809 P.2d 865.); *Cooper*, 255 F.3d at 1107; *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 2, 22, 23.

*894



At the time of these attacks, Petitioner was an escapee of both CIM, where he escaped by foot on June 2, 1983, and from custody in Pennsylvania. *Cooper*, 53 Cal.3d at 876, 281 Cal.Rptr. 34, 809 P.2d 809. In Pennsylvania, Petitioner kidnapped, raped, assaulted, and stole a car from a teenage girl who interrupted him while he was committing yet another residential burglary. ***895** *Cooper*, 53 Cal.3d at 840, 281 Cal.Rptr. 90, 809 P.2d 865; *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 48. He threatened to kill the victim during the attack. He had escaped from custody in Pennsylvania numerous times so that his escape from CIM was his twelfth escape. *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 22. Prior to his arrival in California, Petitioner had also been arrested, charged, and convicted several times of theft-related offenses. *Cooper*, 53 Cal.3d at 802, 840, 841, 281 Cal.Rptr. 90, 809 P.2d 865; *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 25.

In California, Petitioner was arrested, charged, and sentenced to state prison for two counts of residential burglary in Los Angeles County. *Cooper I*, 53 Cal.3d at 802, 281 Cal.Rptr. 90, 809 P.2d 865. Petitioner lied about his identity, background, and criminal history by using the false name of David Trautman. (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. 44, Case No. A-386448). Following his burglary conviction, Petitioner was designated to CIM on April 29, 1983, still using the false name of David Trautman. On June 1, he was transferred to a minimum-security portion of the prison from which he subsequently

escaped. (85 Trial Reporters' Transcript ("RT")[3] 2596-97.)

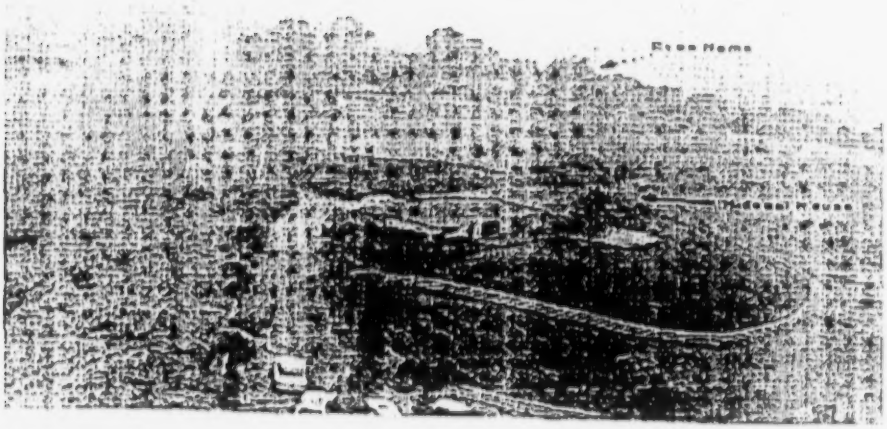
On June 2, 1983 Petitioner arrived at the hideout house. Petitioner's own testimony and the physical evidence, including fingerprints, confirmed that Petitioner was at the hideout house next to the Ryen house at the time of the murders. (87 RT 2959-62, 2967-70, 2991.) The hideout house was down the hill and nearest to the Ryen house.

One of the murder weapons, a hatchet covered with dried blood and human hair, came from the hideout house where Petitioner hid. (87 RT 3004, 3072; 90 RT 3796-97.) Witnesses identified the hatchet as the one missing from the hideout house after the killing. (87 RT 3004, 3072.)

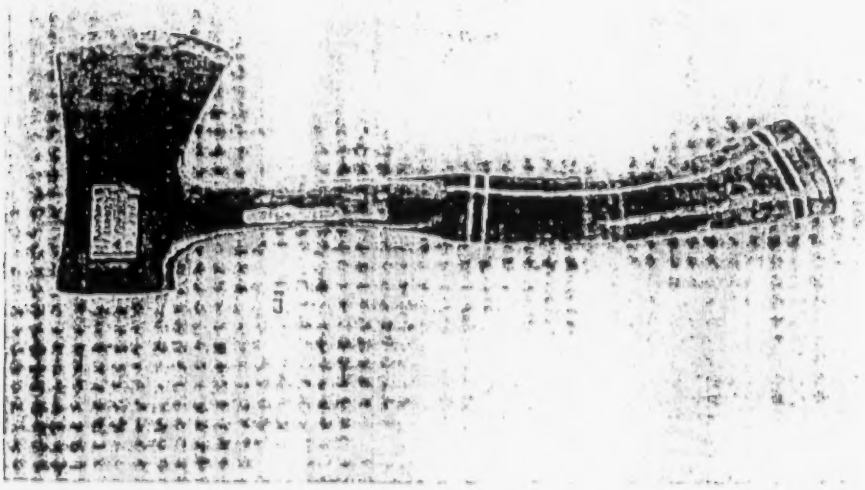
***896**

[3] The Reporters' Transcripts from the original trial are designated by a "RT" and are lodged with the Court. Respondent used the photos in this order in its final habeas argument on April 22, 2005.

BEST AVAILABLE COPY



*897

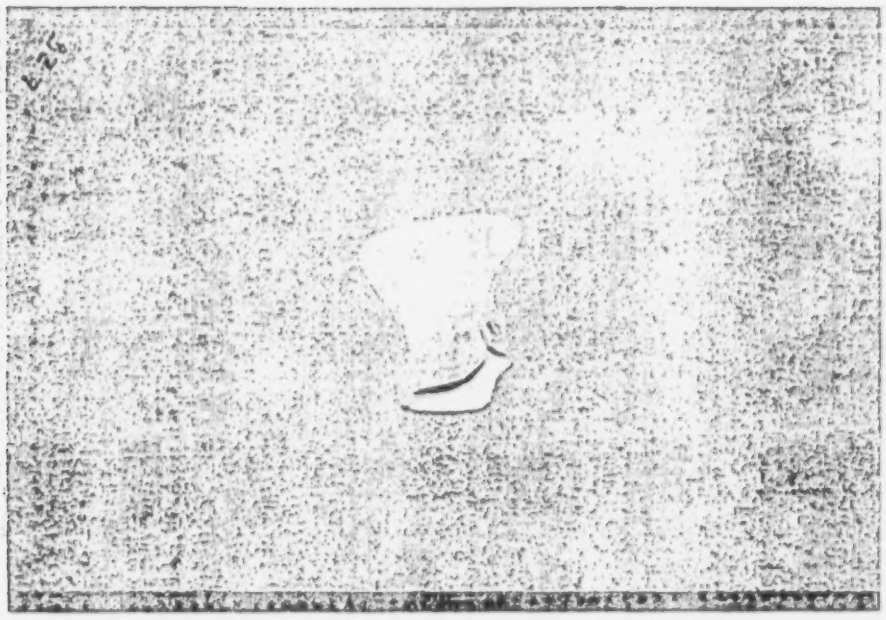


A local citizen discovered the hatchet on June 5, 1983 on the side of English Road, the only paved road leading from the Ryen home out of the immediate area. (89 RT 3519; 90 RT 3791.) The hatchet was covered by bloodstains; its head was

covered by dried blood and human hairs. (90 RT 3797.) Some of the hairs were consistent with those of Doug and Josh Ryen. (96 RT 5015-16.) Dr. Irving Root, who performed the autopsies, concluded that the hatchet could have inflicted the chopping wounds *898 suffered by the victims. (90 RT 3870.) Post-conviction DNA testing confirmed that the blood came from the murder victims. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.)

The hatchet had been kept in a sheath by the fireplace in the hideout house. (86 RT 2685, 2715, 2878-79, 3004.) On June 7, two employees of the owner of the hideout house, Richard Sibbitt and Perry Burcham, discovered the sheath to the hatchet lying on the floor near the bedroom where Petitioner slept. The bedroom had been previously occupied by Kathleen Bilbia, who lived in the hideout house in May. (86 RT 2859-60.) Bilbia recalled seeing it by the fireplace when she was cleaning the house. (86 RT 2685.) The sheath was not on the floor when Bilbia vacated the room. (86 RT 2677, 3004-05.)

*899



Buck knifes, an eleven-inch hunting knife, and ice picks were missing from the hideout house. (86 RT 2860; 87 RT 3002-04.) The hunting knife could have inflicted the remaining injuries. (91 RT 3957.) A strap fitting one of the missing buck knives was found on the floor by the Bilbia *900 bedroom closet where Petitioner slept. (87 RT 3073.)

The victims died from numerous chopping and stabbing injuries from a hatchet. (90 RT 3835.) Doug Ryen suffered at least thirty-seven separate wounds. (90 RT 3835-71.) Two separate chop injuries fractured his skull. (90 RT 3838-39.) Five chop wounds to Mr. Ryen's skull were in a "tight pattern," indicating his skull was stationary when the blows were delivered. (90 RT 3841.) The blows appear to have been administered in rapid succession, within a second or two, as Mr. Ryen was kneeling by the side of the bed. (90 RT 3841.) One blow administered to

Mr. Ryen's skull was consistent with being struck by the blunt side of a hatchet, causing a depressed skull fracture, where the bone was pushed into his head. (90 RT 3849.)

Mr. Ryen sustained numerous stabbing injuries. (90 RT 3852-68.) Mr. Ryen's right middle finger was amputated by a chopping blow. (90 RT 3846.) His severed finger was on the floor inside the Ryen bedroom closet. (90 RT 3381-82.) He sustained another chopping injury to his right ring finger. (90 RT 3846.) Another chop wound cut clear through the bone of his right forearm. (90 RT 3837.) One stab wound penetrated his sternum entering his heart. (90 RT 3853-55.) One stab wound punctured his lung and cut one of his ribs. (90 RT 3861.) There was a slicing injury to the right side of Mr. Ryen's cheek. Before he died, Mr. Ryen was stabbed on the left side of his neck, severing his carotid artery and cutting his trachea. (90 RT 3858.) Mr. Ryen also sustained deep incisions into his right thigh, his left leg and his buttocks area. (90 RT 3866, 3868.)

Peggy Ryen suffered thirty-two separate identified wounds. (90 RT 3872-96.) Mrs. Ryen was five feet, eight inches tall and weighed 140 pounds. (90 RT 3924.) A series of three chopping wounds to the right side of Mrs. Ryen's head were consistent with having been administered while she was standing. (90 RT 3874.) Two chopping wounds nearly formed an upside down "V" on her forehead. (90 RT 3872.)

One triangular defect in her skull, inflicted before death, was consistent with having been made by the

tip of the hatchet. (90 RT 3874-75.) Mrs. Ryen sustained a chopping wound at the midline of the back of her head. (90 RT 3876.) Mrs. Ryen had a defensive wound to her right thumb. (90 RT 3878.) Mrs. Ryen also suffered wounds to her chest, stomach, breast, and neck areas. (90 RT 3882-94.)

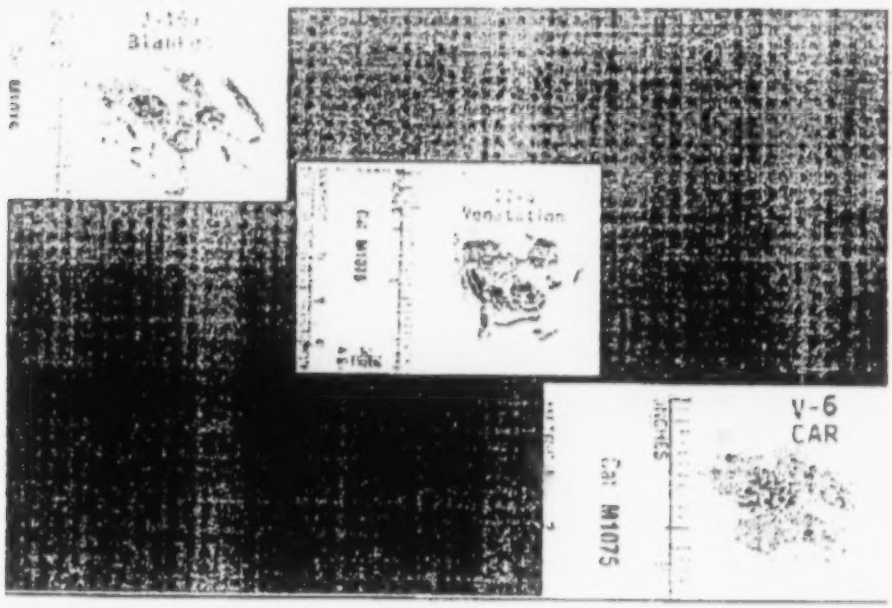
Jessica Ryen suffered forty-six separate identified wounds, consisting of a combination of chopping and stabbing or incision wounds. (90 RT 3896-23.) Jessica was four feet, eleven inches tall, and weighed eighty pounds. (90 RT 3924.) Two wounds were from a single blow that formed a "V" in her forehead. (90 RT 3896-97.) A chopping blow to the right side of her nose and cheek fractured her jaw. A chopping injury to the top of Jessica's head resulted in a fracture. (90 RT 3898.)

A wound to Jessica's lower left back was consistent with the knife being drawn across her back and then inserted into her back. The bruising associated with the wound showed that it was one of the earlier wounds suffered by Jessica. (90 RT 3908-09.) Jessica suffered a stab wound to her neck. The wound resulted in massive bleeding. Unconsciousness from the wound would have occurred in as little as thirty to sixty seconds, and would have been fatal in a couple of minutes. (90 RT *901 3903-04.) Three stab wounds to Jessica's chest were in close proximity to each other, suggesting the wounds were delivered in rapid succession. The wounds were consistent with having been delivered while Jessica was in the position in which she died. (90 RT 3905-06.)

Jessica suffered a grouping of twenty separate carving injuries on her chest. Some were associated with slight bleeding, but most apparently occurred after Jessica had stopped bleeding. The injuries were consistent with an ice pick, a nail, or an awl having been used. These injuries were primarily inflicted while Jessica was in the position in which she died. (90 RT 3910-12.)

Plant burrs were found inside Jessica Ryen's nightgown that were similar to the burrs on the blanket inside the closet where Petitioner slept, (106 RT 7678-81), burrs from the vegetation between the hideout house and the Ryen house, and in the car.

*902



Chris Hughes suffered twenty-five separate identifiable wounds. (90 RT 3924-45.) Chris was four

feet, eleven inches tall, and weighed eighty-six pounds. (90 RT 3924.) A chopping wound to his right wrist went through the bone of his forearm, almost severing his hand from his wrist. (90 RT 3925.) A chopping wound almost amputated*903 his right second finger, leaving the finger attached to the hand by only a small portion of skin. (90 RT 3926.) Chris also suffered a chopping injury to his right hand. The injuries were consistent with Chris placing his hand by the right side of his head in an effort to protect his head. (90 RT 3926-27).

Chris suffered six parallel chopping wounds with fractures down the side of his head, extending from the front to the back of his head. There was little bleeding associated with the series of chopping wounds, indicating that Chris was dying or already dead when they were administered. (90 RT 3927-28.) Chris suffered a chopping or incision wound that fractured the facial bones and cut his nose. (90 RT 3929.) Chris suffered a chopping injury to the top of his head, and stab wounds to his chest, back, head and arms. (91 RT 3932-36, 3939-40.) Chris suffered two post-mortem wounds in his right armpit area, from a "pushing" action of the knife. (91 RT 3943-44.)

Josh's injuries included a hatchet wound to the top of his head, a stab wound to his throat, and a hatchet wound near his left ear. (Trial Exs. 478-81, 699, 706A-H, 709, 726, 727; 88 RT 3354-56.) Dr. Root, who performed the autopsies, believed the injuries could have been inflicted quickly, within one minute for each of the victims. (91 RT 3957-58.) He opined each victim would have died within minutes

after being attacked. (91 RT 3959-61.) All of the victims had a moderate amount of food in the stomach, indicating that death probably occurred about one to three hours after they had eaten last. (91 RT 3961-62.)

Prior to the murders, the Ryens and Chris Hughes attended an annual barbecue, on June 4, 1983, at the home of George Blade in Los Serranos, a few miles from the Ryen home in Chino. (88 RT 3177, 3179, 3181.) Chris had received permission from his parents to spend the night with the Ryens. (88 RT 3188.) They left the Blade residence to drive to the Ryen home sometime around 9:00 p.m. (88 RT 3182.) The Ryens' neighbor, Larry Lease, saw the Ryen truck returning sometime between 9:00 and 9:30 p.m. (86 RT 2757-58, 2780.) Except for Josh, they were never seen alive again. *Cooper*, 53 Cal.3d at 794, 281 Cal.Rptr. 90, 809 P.2d 865.

The next morning, June 5, 1983, Chris' mother, Mary Ann Hughes, became concerned when he did not come home. (88 RT 3189-90.) She called the Ryen residence a number of times, but only heard busy signals. (88 RT 3190.) Shortly after 9:00 a.m., Mrs. Hughes went to the Ryen home. (88 RT 3190.) She noted the barn was closed and it did not look like the horses had been fed. She only saw the Ryens' truck at the house. (88 RT 3190-91.)

At about 11:30 a.m., Mr. Hughes went to the Ryen home to investigate. (88 RT 3191.) He noticed the Ryen truck, but did not see their station wagon. (88 RT 3195, 3202-03.) Mr. Hughes went to the kitchen door, looked inside, tried the door, but it was

locked. The Ryens were in the habit of leaving their doors unlocked when they were at home. (88 RT 3194.) He continued around the outside of the house until he reached the sliding-glass door leading into the Ryen master bedroom. (88 RT 3197.) He looked inside the sliding glass door and saw the body of his son, Chris, the unclothed bodies of Doug and Peggy Ryen, and Josh Ryen laying on the floor between his mother and Chris. (88 RT 3198-99.) Of the four people he could see, only Josh appeared to be alive. (88 RT 3199.)

***904** Mr. Hughes frantically tried to open the sliding door. (88 RT 3200, 3203.) Josh looked up as Mr. Hughes shook the sliding glass door. Mr. Hughes asked Josh if he could open the door. (88 RT 3199.) Mr. Hughes rushed to the kitchen door, kicked it in, and entered. (88 RT 3204.) As he approached the master bedroom, he found Jessica on the floor in the hallway, also apparently dead. (88 RT 3205.) In the bedroom, Mr. Hughes touched the body of his son. It was cold and stiff. (88 RT 3205.) Mr. Hughes asked Josh who had done it. (88 RT 3205.) Josh appeared stunned; he tried to talk but could only move his lips. (88 RT 3205-06.)

Mr. Hughes tried to use a telephone in the house, but it did not work. He drove to a neighbor's house, seeking help. (88 RT 3206-07.) The police arrived shortly. (88 RT 3211-12.) Doug, Peggy, Chris, and Jessica were dead. The first three were in the master bedroom and Jessica was on the floor in the hallway that leads into the master bedroom. (88 RT 3214-18.) Josh was on his side in a fetal position. His eyes were open, but he was unable to speak or move. (88

RT 3221, 3258.) He had difficulty breathing. Josh's neck wound was not bleeding at the time and paramedics tried unsuccessfully to find a pulse in Josh, symptoms consistent with severe shock. (88 RT 3313-17.) Josh was flown by helicopter to Loma Linda University Hospital. (88 RT 3321.)

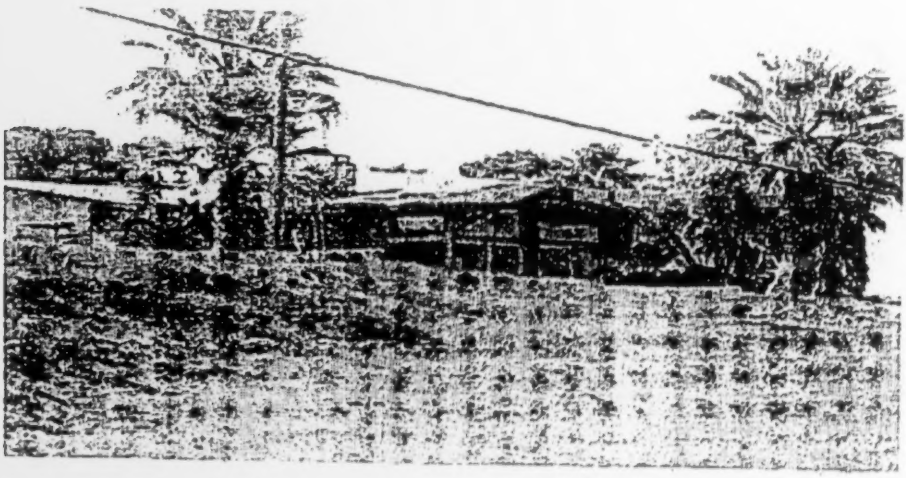
Josh had a limited memory of the attack. During the night of the murder, Josh woke up by a scream. (95 RT 4955-56.) He walked down the hall, stopping at the laundry room. Josh saw Jessica lying right by the bedroom door in the hallway. (95 RT 4956-58.) When he saw Jessica, he saw a "shadow or something" by the bathroom. It was dark. Josh could not see what the shadow was or what it was doing. (95 RT 4969-70.) There were no sounds from his parents and Josh could not see them. (95 RT 4958-59.)

The next thing he remembered was "[j]ust waking up" surrounded by the bodies of his parents. (95 RT 4959-62.) Josh's first memory after waking up was Mr. Hughes asking him if he could open the sliding glass door to the master bedroom. (95 RT 4962.)

Kathleen Bilbia, an employee of Larry Lease, had been living in the hideout house in May, and she had used the bedroom Petitioner later slept in (the "Bilbia bedroom"). (86 RT 2665.) She moved out of the house during May. By May 27, most of her belongings had been removed. (86 RT 2665.) On May 30 and June 1, Ms. Bilbia vacuumed and cleaned portions of the house, including the bathroom she had used. She cleaned the countertop, sinks,

showers, and shower doors in the Bilbia bathroom. (86 RT 2666-68.) Petitioner slept in the closet of the bedroom nearest the garage where Ms. Bilbia used to sleep. (86 RT 2693-94; 97 RT 5284-85.) The window by the hideout house fireplace provided a view of the Ryen house. (86 RT 2693-94; 97 RT 5284-85.)

***905**



The hideout house had two telephones: one in the Bilbia bedroom and another in the kitchen. (86 RT 2669-70.) Petitioner admitted that he called Yolanda Jackson and Diane Williams from the hideout house and asked for their help, but they declined. (97 RT 5404-07; 86 RT 2792.) Telephone records and Ms. Jackson's testimony ***906** showed that two calls were made from the hideout house to the Los Angeles area telephone number of Yolanda Jackson. The first call lasted 110 minutes beginning on June 3 at 12:17 a.m., and the second call lasted four minutes beginning at 2:26 a.m. the same morning. (87 RT

2898-2900, 86 RT 2790; 2794; 86 RT 2790.) Two calls were also made from the hideout house to Diane Williams in Pittsburgh, Pennsylvania. The first call lasted three minutes beginning on June 3 at 11:46 a.m., and the second lasted thirty-four minutes beginning on June 4 at 7:53 p.m. (87 RT 2896-2901; Trial Ex. 82.) Petitioner admitted that he called Diane Williams at about 8 p.m. on Saturday, June 4, 1983, the night of the murders. (97 RT 5435.) Diane Williams told Petitioner she did not have any money for him. (97 RT 5435-36.) Petitioner decided to leave the hideout house after the phone call. "This final call was only an hour or so before the Ryens and Chris Hughes left the Blade house for their unsuspected rendezvous with death." *Cooper*, 53 Cal.3d at 796, 281 Cal.Rptr. 90, 809 P.2d 865. Petitioner testified that he put on his prison clothes including prison-issued tennis shoes, camp jacket, and some clothes he found at the hideout house. (97 RT 5436.) He put other clothes he had into a bag he was carrying right before he left the hideout house, including a blue prison shirt. (99 RT 5852.)

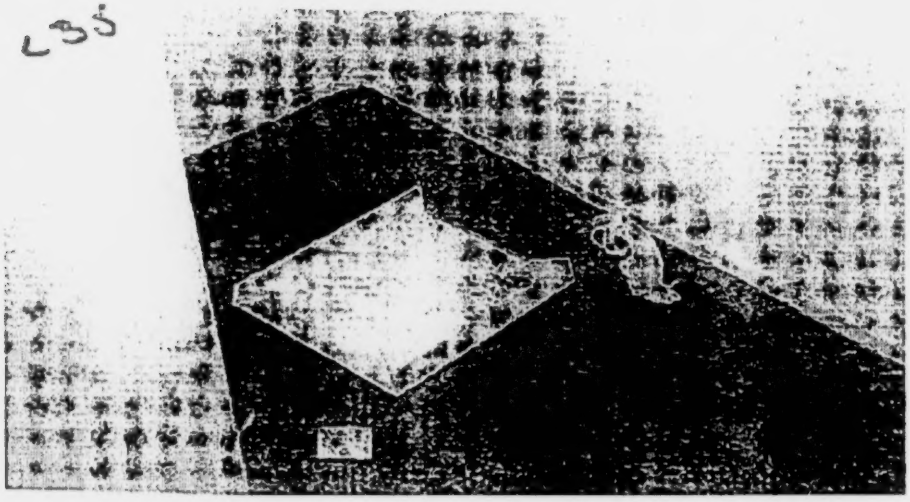
A search after the murders of the hideout house located a portion of a Viceroy cigarette butt (J-20) in the headboard in the Bilbia bedroom. (87 RT 3076-77.) Mr. Lang's Viceroy cigarettes were missing from the kitchen drawer. (86 RT 2854, 2860.) Ms. Bilbia did not smoke and, to her knowledge, no one smoked in her bedroom during the eighteen months she lived there. (86 RT 2668.) San Bernardino County Sheriff's Crime Lab criminalist Daniel Gregonis performed an analysis of the saliva on the cigarette butt which was consistent with a non-secreter such as Petitioner. (93 RT 4474-75.) Only twenty percent

of the population are non-secretors. (94 RT 4707). A belt belonging to Mrs. Lang was found in the closet of the Bilbia bedroom. (87 RT 3076.) The size 30 belt contained two hand-made holes in it in addition to the five manufactured holes with which it came. (87 RT 2973, 2994; Trial Ex. 77.) Petitioner's waist was approximately thirty-two inches in June of 1983. He was issued size-32 pants at CIM. (98 RT 5562-63.)

Petitioner's fingerprint was positively identified on a jar of Coffee Mate in the kitchen of the hideout house. (87 RT 2960.) A footprint was found on the Bilbia bathroom shower sill, separating the inside of the shower from the rest of the bathroom. (87 RT 2943-44.) The shower footprint was determined to have been left by Petitioner. (87 RT 2961-62.)

Police recovered a blanket with a semen stain that was part of the bedding in the closet of the Bilbia bedroom. Petitioner's genetic profile was consistent with his having deposited the semen stain on the blanket. (93 RT 4459-65.) A bloodstained khaki green button was found on the rug in the Bilbia bedroom. (87 RT 3072-73; Trial Exs. 45, 49, 97.) It was identical in appearance to buttons on field jackets inmates wore at CIM, including one Petitioner was seen wearing shortly after his escape. (85 RT 2398, 2417.) A coiled, bloodstained rope was found in the Bilbia bedroom closet. (86 RT 2682, 2842.) The rope was similar to rope kept elsewhere in the hideout house and surrounding property. (86 RT 2733, 2778.)

*907



A criminalist from the San Bernardino County sheriff's crime laboratory sprayed various areas of the hideout house with luminol, a substance used to detect the presence of blood not visible to the naked eye. (87 RT 3079.) A positive reaction *908 consisting of an even "glow" ranging from about two feet to five feet above the floor was obtained on the shower walls in the Bilbia bathroom. (87 RT 3080.) There were also four positive reactions to the luminol on the rug in the hallway leading to the Bilbia bedroom that appeared to be foot impressions. (87 RT 3081.) Other positive reactions were obtained in the bedroom closet and bathroom sink. (87 RT 3082-83.) The reactions did not prove the presence of blood, but were "an indication that it could be blood." (87 RT 3082.)

Investigators recovered hair samples from the sink and debris from the shower drain. (87 RT 3084.) Some hair in the bathroom sink trap was matted and appeared to have been there a long time. (96 RT 5017.) Other hair was not matted and microscopic

examination of that hair revealed characteristics similar to Jessica's head hair. (96 RT 5017-18.) A hair removed from the bathroom shower had characteristics similar to Doug Ryen's head hair. (96 RT 5017.)

Investigators found three significant shoe-print impressions: a partial sole impression on a spa cover outside the Ryen master bedroom (88 RT 3363), a partial bloody shoe print on a sheet on the Ryen bedroom waterbed (89 RT 3506), and a nearly complete shoe-print impression in the game room of the hideout house. (87 RT 2925.) All three appeared to come from tennis shoes. (88 RT 3364-65; 89 RT 3504-07.)

Two partial shoe prints and one nearly complete shoe print found in the Ryens' house were consistent both with Petitioner's size and the Pro-Keds shoes issued at CIM. Petitioner testified that his shoe size was between a 9 and a 10.(98 RT 5532-33.) James Taylor, an inmate at CIM, met Petitioner when both were in medium security at CIM. (85 RT 2508-09.) Taylor testified that he issued Petitioner a pair of Pro-Keds Dude tennis shoes. (85 RT 2510-11.)

The Stride Rite Corporation sold Pro-Keds Dude tennis shoes to state and federal governments for use in institutions such as CIM. (86 RT 2620-24.) All "Dude" tennis shoes contain the same diamond sole pattern. The general merchandise manager for Stride Rite testified that this pattern is not found on any other shoe that the company manufactures nor, to his knowledge, on any other shoe. (86 RT 2620-24.) At trial, contracts showing the purchase of the

Dude tennis shoes by CIM were admitted into evidence. *(See* Trial Ex. 84-88.)

Most of the blood at the scene of the crime was consistent with having come from one or more of the victims. (92 RT 4401-25.) Significantly, a drop of blood (item A-41) found on the hallway wall opposite the door to the Ryens' master bedroom belonged to an African-American male, which is consistent with Petitioner. (89 RT 3511-12; 88 RT 3373.) Crime scene deputies recovered A-41 at 12:25 a.m. on June 6, 1983, shortly after the police arrived at the crime scene. (89 RT 3511-12.)

Criminalist Gregonis examined this drop of blood and concluded from electrophoretic testing that the blood could not have come from any of the victims. (93 RT 4426.) Based upon results obtained for several enzymes, Mr. Gregonis also concluded that the drop was consistent with Petitioner's blood. (93 RT 4433, 4426-29.) Because of various characteristics, the blood was from an African-American person such as Petitioner. (93 RT 4424.)

Mr. Gregonis and Dr. Edward Blake, an expert employed by the defense, further ***909** tested A-41. Because of the limited amount of the remaining sample, Dr. Blake performed tests that the defense believed had the best chance of excluding Petitioner as a possible donor. (105 RT 7411-12.) The transferring test was chosen because it had an excellent chance of excluding Petitioner if he was not the donor of A-41. However, the transferrin test was consistent with Petitioner's genetic profile. The transferrin test indicated that the person who left

A-41 was a person of African-American heritage. (105 RT 7405.) The transferrin test excluded any of the Ryens or Chris Hughes from being the source of A-41. (105 RT 7404-05.) The peptidas A type (2-1) of A-41 also matched the peptidase A type of Petitioner. The peptidas A type (2-1) of A-41 also meant that the person who deposited A-41 was a "person of black ancestry." (105 RT 7409.) The haptoglobin type of A-41 also indicated a person of African-American heritage. (105 RT 7409-10.) The additional tests included Petitioner as a possible donor. (105 RT 7411-12.) Petitioner's expert, Dr. Blake, was not able to exclude Petitioner as the source of A-41, but was able to exclude A-41 as having come from a Caucasian or Hispanic. (105 RT 7431-32.) Post-conviction DNA testing confirmed that Petitioner is the source of A-41 (one in 310 billion). (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.)

Electrophoretic testing also established the blood on the rope found in the Bilbia bedroom closet could have come from one of the victims but not Petitioner. The bloodstains on the rope were consistent with being a mixture of blood from either Jessica and Doug Ryen, or from Peggy and Doug Ryen. (93 RT 4404-05.) There was a positive luminol reaction in the area of the Ryen driveway where the rope was found. There was also a small luminol trail produced leading up to the rope, which was consistent with the bloodstained rope having been dragged along the driveway. (89 RT 3560-61.)

A luminol test on the sink in the Ryen master bathroom was positive, indicating the presence of

blood. The nature of the luminol result was consistent with blood having been diluted with water in the sink and diluted blood having flowed down toward the sink drain, as if someone had washed blood off their hands in the sink. (89 RT 3558-60.) Tests revealed the presence of blood in the shower and bathroom sink of the hideout house, and hair found in the bathroom sink was consistent with that of Jessica and Doug Ryen. (96 RT 5017-18.)

The Ryens' vehicle was missing from the house when the bodies were discovered but was later found in Long Beach. The police found loose tobacco on the front passenger seat and floorboard. Possible blood stains were observed on the front passenger seat and driver's side-door jam. The car did not appear to have been hot-wired. (92 RT 4205-10, 4217-21.)

Two cigarette butts were recovered from the station wagon. (92 RT 4287, 4290.) A hand-rolled cigarette (V-12) was found in the crevice formed by the vertical and horizontal portions of the front passenger seat. (92 RT 4287.) Some loose "Role-Rite" tobacco, that is provided free to CIM inmates and not available at retail, was on the floorboard just to the right of the front passenger seat. (92 RT 4287-90, 5067.) Similar loose-leaf tobacco, identified as being Role-Rite, was found in the bedroom of the hideout house where Petitioner had stayed. (96 RT 5065.) San Bernardino County Sheriff's Crime Lab Criminalist Craig Ogino examined visually ***910** and microscopically the two samples of the loose tobacco and the tobacco from the hand-rolled cigarette. Each sample was consistent with each other and with Role-Rite tobacco. (96 RT 5069.) In addition, Aubrey

Evelyn, a manager with the company that manufactures Role-Rite tobacco, also testified that the tobacco found in the Ryen car was consistent with Role-Rite. (95 RT 4898.) A witness testified that Petitioner smoked hand-rolled cigarettes using Role-Rite tobacco. (85 RT 2505-06.) Petitioner had no money in his prison account during May and June of 1983 with which to purchase commercially made cigarettes. (85 RT 2600.) A manufactured cigarette butt (V-17) was also found in the front passenger seat area. (92 RT 4289.)

A hair fragment discovered in the car was consistent with Petitioner's pubic hair and a spot of blood found in the car could have come from one of the victims but not from Petitioner. (95 RT 4828-33.) Luminol testing resulted in very light positive reactions in portions of the car, some of which were consistent with the light presence of blood. (92 RT 4293-97.) One of the stains on the driver's door jamb (W-3) was found to be human blood, ABO type AB, consistent with being the blood of Peggy and Jessica, but inconsistent with Petitioner's ABO type, which is type A. (93 RT 4478-79.)

Saliva tests on the two cigarette butts in the Ryen station wagon were consistent with both cigarettes having been smoked by a non-secretor such as Petitioner. (93 RT 4472-77.) Only twenty percent of the population are non-secretors. (94 RT 4707.) The ABO blood type of the person who smoked V-17, the manufactured cigarette butt, was determined to be type A, which is also consistent with Petitioner's blood type. (94 RT 4725-26.) Post-conviction DNA tests confirmed that the cigarette

butts were Petitioner's (one in 19 billion and one in 110 million). (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.)

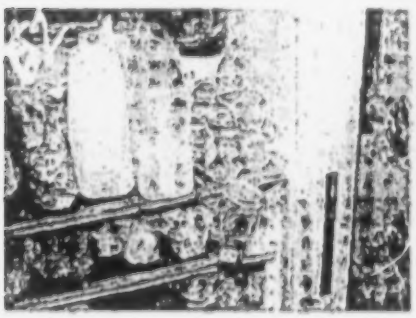
Several hairs were recovered from the vehicle and two criminalists microscopically compared the hairs with Petitioner's hair. One believed that one of the hairs (V-19) probably came from an African-American, and that "there was enough similarity between ... the hairs from Mr. Cooper and the unknown hair that I felt the unknown hair was consistent with coming from Mr. Cooper." (95 RT 4833.) The second criminalist also found it was consistent with Petitioner's hair. Both believed it was most likely pubic hair. (95 RT 4828-33.)

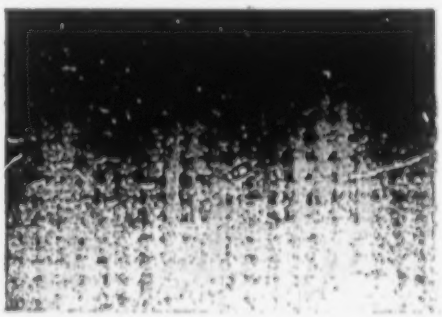
Plant burrs were recovered from the Ryen station wagon. The burrs were similar to plant burrs found on the inside of Jessica Ryen's nightgown and numerous plant burrs found on the blanket inside the Bilbia closet which was part of the bedding found in the closet. (106 RT 7678-81.) The burrs were also similar in appearance to the burrs from parts of vegetation samples taken from the area between the Ryen home and the hideout house. All of the burrs were macroscopically and microscopically similar. (106 RT 7677-81, 7687.) An expert for the defense, Dr. John Thornton, concluded the burrs were all the same type, known as Medicago. He agreed that the burrs from the blanket in the Bilbia closet were "virtually identical" to the two burrs found on the inside of Jessica's nightgown. (105 RT 7521-22, 7541-43.) Dr. Thornton agreed that Jessica's killer had moved her nightgown up on her body after she was already dead in order to inflict a series of post-

mortem wounds on her chest with an ice-pick or similar instrument. (105 RT 7526-28.) *911 The position in which Jessica was found was consistent with her killer getting down on his knees to inflict cuts in her chest after she was dead. (105 RT 7529.)

Petitioner admitted drinking beer at the hideout house. (98 RT 5613-14.) A six-pack of Olympia Gold beer with one can missing was found in the refrigerator of the Ryen house. One bloodstained can was hanging over the edge of a shelf. (88 RT 3375.) A nearly empty can of Olympia Gold beer similar in appearance to those in the Ryen refrigerator was found in a plowed horse-training arena about midway between the Ryen home and hideout house. (90 RT 3800-03.)

*912





After the murders, Petitioner escaped to Tijuana, Mexico. (98 RT 5450-60.) Petitioner checked into a hotel in Tijuana at around 4:00 p.m. on Sunday, June 5, 1983 using the false name of Angel Jackson. (98 RT 5462.) Tijuana is only two hours *913 by car from the San Bernardino area, leaving ample time for Petitioner to commit the murders the night of

June 4, 1983, drive to Long Beach and escape to Mexico on June 5, 1983. On June 6, at about 10:00 p.m., Ms. Williams received a collect call from Petitioner in Tijuana, Mexico. (88 RT 3175-76; Trial Ex. 113.)

From Tijuana, Petitioner made his way to Ensenada, Mexico. (98 RT 5468.) On June 9, 1983, he met Owen and Angelica Handy in Ensenada. *Cooper*, 53 Cal.3d at 800, 281 Cal.Rptr. 90, 809 P.2d 865; 95 RT 4838-40, 4874-75. Petitioner again lied about his identity to the Handys when he met them, claiming to be Angel Jackson when he asked them for work. (95 RT 4839-40.) Petitioner worked on the Handys' boat, which was in dry dock. The Handys then set sail for San Francisco and Petitioner went with them. (95 RT 4841.) The Handys saw Petitioner in possession of numerous items identified as having been taken from the hideout house. Petitioner had Mrs. Lang's blue sweat pants and gloves. (95 RT 4849-54, 4876-78.) When they stopped at various places along the way, Petitioner stayed on the boat and did not go ashore. They were in Santa Barbara for three or four days. (95 RT 4843-44.)

On July 30, 1983, Santa Barbara County Sheriff's Department responded to a call for assistance of an attempted rape on a boat docked next to the Handys' boat in Pelican Cove. The 26-year-old female victim reported that Petitioner attempted to rape her at knife point. (04-CV-656, NOL filed April 15, 2005, Resp't CIM Vault, Notebook 3 at 431.) Petitioner tried to flee when the authorities came to the dock to arrest him. The Sheriff's observed Petitioner throw an object into the water before he dove off of the

Handy's boat, swam to a dinghy, and started to row for shore. (95 RT 4846.) The sheriffs recovered a knife from the water where Petitioner attempted his unsuccessful escape.[4]

At trial, Petitioner admitted that he was at the hideout house, just 126 yards from the crime scene, but denied he committed the murders. The jury evaluated his credibility and concluded that there was proof beyond a reasonable doubt that Petitioner committed the murders. Petitioner testified he was at CIM under a false name, David Trautman, as a result of pleading guilty to two counts of residential burglary in Los Angeles County. (97 RT 5327-29; 98 RT 5499, 5875.) Petitioner admitted escaping from CIM, eluding CIM personnel, and hiding in a lumber yard until he was able to make his way on foot under the cover of darkness to the hideout house. (97 RT 5362-85.) He admitted hiding out close to the Ryen home, and sleeping in the Bilbia bedroom. (97 RT 5382-5417.) Petitioner testified that he slept on the Langs' bed in the hideout house on Thursday night, June 2, 1983, but when he woke up Friday morning, June 3, 1983, he realized he could have been seen in their bedroom, and decided to stay in the Bilbia bedroom closet. (97 RT 5408, 5414-15.)

Petitioner admitted he was wearing his prison camp jacket at the time of his escape, and prison-issued tennis shoes but denied ever receiving any tennis shoes from inmate Taylor. (97 RT 5349, 5350-

---

[4] At trial, the prosecution presented evidence of Petitioner's arrest, but not the report of the rape at knife point or the knife that was recovered from the water.

51, 5356-58, 5385-89.) Petitioner testified the pair of shoes he was wearing were a size 9.(98 RT 5555-56.) Petitioner's prison-issued shoes were never recovered. *914 Petitioner testified that he threw the prison-issued shoes along with other prison clothing into the ocean when the Handys' boat sailed into United States' waters. (98 RT 5892-95.)

Petitioner indicated that he drank beer that was in the garage refrigerator at the hideout house. The first thing Petitioner did at the hideout house was "[w]ent and had me a beer." (98 RT 5613-14.) Petitioner admitted having some "roll-your-own" (i.e., Role-Rite) tobacco with him when he escaped, as well as fifteen Kool cigarettes. (97 RT 5362-63.)

On Saturday night, after Ms. Williams told him she didn't have any money, Petitioner claimed he left the hideout house and "went back down the hill" on foot at night in the same manner as when he walked up the hill to hide out following his escape from CIM. (97 RT 5435-38.) He stated he stopped drivers and asked them for directions to Mexico. (98 RT 5449-50.) The jury rejected Petitioner's implausible testimony that he left on foot and asked drivers in the area at night for directions to Mexico.

Petitioner denied going to the Ryen house and denied killing anyone in the house. (97 RT 5327; 98 RT 5492.) Petitioner admitted watching television to check for possible news reports about his escape. (97 RT 5416-17, 5425-26.) Petitioner admitted taking two pairs of gloves from the Langs' bedroom, but denied wearing them in the hideout house, or making any effort to avoid leaving fingerprints. (98

RT 5513.) The only fingerprint left by Petitioner in either the Ryen home or the hideout house was on a Coffee Mate jar in the kitchen in the hideout house. (87 RT 2956-60.) He explained that he took the gloves only to wear as he left the hideout house to protect his hands because he hurt his hands when he fell while coming up the hill to the hideout house following his escape from CIM. (98 RT 5513.)

Petitioner denied bringing the bloodstained nylon rope into the closet in the Bilbia bedroom. (97 RT 5419; 99 RT 5834-36.) He denied smoking a Viceroy cigarette and putting it in a napkin in the Bilbia headboard. (97 RT 5418-19.) Petitioner denied bringing Mrs. Lang's belt into the Bilbia bedroom closet. (97 RT 5415; 99 RT 5834-36.)

Petitioner denied that he left the semen stain on the blanket in the Bilbia closet. (98 RT 5523.) He denied using the Bilbia bathroom for the three days he was in the hideout house, other than once to test the water in the shower. He testified he always used the Langs' bathroom instead, even though he was sleeping in the Bilbia bedroom and all of his personal items were in the Bilbia bedroom. (98 RT 5682; 99 RT 5808.) Petitioner did not see any blood in the Bilbia bathroom while he was at the hideout house. (99 RT 5808-09.)

The prosecution effectively cross-examined Petitioner by pointing out inconsistencies in Petitioner's account and questioning Petitioner's credibility. After due deliberation, the jury concluded that Petitioner committed the murders.

In the penalty phase of the trial, the defense presented several friends and relatives of Petitioner who testified about his good qualities and their continuing love for him. The prosecution presented evidence that on October 8, 1982, a man stipulated to be Petitioner burglarized a home in Pennsylvania, assaulted a high-school student who interrupted the burglary, kidnapped and raped her, and then stole her car. (107 RT 7956-66.) Petitioner took the teenager to a secluded portion of a ***915** park, threatened her, and ordered her to remove her jeans and underpants. He grabbed her by her hair and forced her face down to the ground. She could feel a screwdriver against the back of her neck as she lay face down, nude from the waist down, upset and crying. Petitioner took down his pants and raped her vaginally from behind. (107 RT 7965-66.)

Petitioner told her to keep her face down, got up, pulled up his pants, jumped into her car and drove off. Before leaving Petitioner said, "I should kill you." (107 RT 7966.) She ran to a nearby house and called the police. Petitioner was identified from a thumb print on the outside of the dining-room window of the house he was burglarizing when he kidnapped his victim. (107 RT 7977-78.) He also left a palm print on the automatic gearshift leaver of his victim's car. (107 RT 7979-81.) The jury was also allowed to consider as an aggravating factor Petitioner's prior conviction of two counts of burglary in Los Angeles. *Cooper*, 53 Cal.3d at 802, 281 Cal.Rptr. 90, 809 P.2d 865.

The jury carefully considered the evidence in aggravation and mitigation and returned a verdict of

death. The death penalty was confirmed by the trial judge, and affirmed by the state and federal courts. (107 RT 8144-40); *Cooper*, 53 Cal.3d 771, 281 Cal.Rptr. 90, 809 P.2d 865 (1991); *Cooper I*, 92-CV-427, Aug. 25, 1997 Order; *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir.2001); *Cooper v. Calderon*, 537 U.S. 861, 123 S.Ct. 238, 154 L.Ed.2d 100 (2002).

Petitioner's trial was conducted in 1984-1985, prior to the advent of DNA testing. In post-conviction proceedings, Petitioner sought DNA testing to prove his innocence. Subsequent to the passage of California Penal Code section 1405, the People agreed to have certain DNA testing performed in 2001. *(See* Joint DNA Agreement.) Petitioner, with the assistance of his post-conviction counsel and two nationally recognized DNA experts, entered into a Joint DNA Agreement to test the evidence. The Joint DNA Agreement specified the items of evidence to be tested: remaining blood from the drop of blood, A-41, found in the hallway on the wall directly across from the doorway to the Ryen master bedroom; one handrolled and one manufactured cigarette butt found inside the Ryen station wagon after it was recovered in Long Beach; the hatchet; the T-shirt found near the Canyon Corral Bar; a button found in the Bilbia bedroom; and hair recovered from the hands of the victims. (Answer, Ex. 86 at 11.) The Agreement provided that STR Profiler Plus DNA testing be performed by the Department of Justice Berkeley DNA Laboratory ("DOJ Berkeley") on the specified items of evidence in two stages: "blind" STR Profiler Plus DNA testing was to be performed on the specified pieces of crime scene evidence, followed by STR Profiler Plus DNA

testing on the known exemplars from Petitioner and the victims. (Answer, Ex. 86 at 11.) The "blind" test results from the crime scene evidence would then be compared with the results obtained from the known reference samples from Petitioner and the victims. Petitioner's own post-conviction DNA expert, Dr. Blake, identified the drop of blood (A-41) and the two cigarette butts recovered from the stolen Ryen station wagon as "the most relevant biological evidence" in the case. (Answer, Ex. 89 at 4.) Additionally, Petitioner had the assistance of Christopher Plourd, a nationally recognized DNA expert, in support of his post-conviction DNA testing.

***916** Petitioner's successive petition challenges the results of this post-conviction DNA testing. These DNA results provide strong evidence that Petitioner is the killer and sole person responsible for the Ryen/Hughes murders. (DOJ Physical Evidence Exam Report dated July 2, 2002; Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) Specifically the results established that Petitioner was the donor of the DNA found on the following items:

(1) a bloodstain in the Ryen home near the master bedroom where the victims were attacked matched Cooper's DNA profile and was found to occur at random in the population with a frequency of approximately 1 in 310 billion for African Americans, 1 in 270 billion for Caucasians, and 1 in 340 billion for Western Hispanics;

(2) two cigarette butts found in the stolen Ryen station wagon when it was recovered in Long Beach

had Cooper's DNA, with one cigarette having enough DNA sample that it would occur at random in the population with a frequency of about 1 in 19 billion African Americans, 1 in 11 billion for Caucasians, and 1 in 15 billion for Western Hispanics; and the other cigarette having enough DNA sample that it would occur at random in the population with a frequency of about 1 in 110 million African Americans, 1 in 16 million for Caucasians, and 1 in 12 million for Western Hispanics; and

(3) a bloodstain on a[T-] shirt found on the side of a road within two miles of the Ryen home had DNA matching Cooper's and partial DNA profiles matching that of two of the victims, Doug and Peggy Ryen. The DNA matching Cooper's found on the t-shirt occurs at random in the population with a frequency of about 1 in 110 million for African Americans, 1 in 16 million for Caucasians, and 1 in 12 million for Western Hispanics.

(Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 1-4.) In addition to the DNA evidence inculpating Petitioner, DNA profiles of blood taken from a hatchet that was taken from the house where Petitioner hid after his escape from prison matched that of several of the victims including Doug Ryen, Jessica Ryen and Chris Hughes. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 4.)

Petitioner requested a hearing in the Superior Court of California regarding the DNA results. Judge Kennedy of the San Diego Superior Court held an evidentiary hearing on June 23-25, 2003.

Petitioner called witnesses, including DNA expert Christopher Plourd. (92-CV-427, NOL filed Feb. 3, 2004, Reporters' Tr., Vols. 1-3 dated June 23-24 and 25, 2003 before Hon. William H. Kennedy in Case No. CR 72787; 92-CV427, NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order filed July 2, 2003 at 4.) Three of the original crime scene criminalists, persons from the San Bernardino Sheriff's Property Division, a Supervisor from the Diego Superior Court Exhibit Room and DOJ criminalist Steven Meyers also testified. (92-CV-427, NOL filed Feb. 3, 2004, Reporters' Tr., Vols. 1-3 dated June 23, 24 and 25, 2003 before Hon. William H. Kennedy in Case No. CR-72787; NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order dated July 2, 2003 at 4.) Judge Kennedy listened to all of the sworn testimony, including criminalist Gregonis and determined that, "Petitioner has not made any showing that law enforcement personnel tampered with or contaminated*917 any evidence in his case." (92-CV-427, NOL filed Jan. 23, 2004, Ex. No. 6, Judge Kennedy Order dated July 2, 2003 at 10.) After reviewing written motions, listening to the testimony presented by both sides and hearing arguments, Judge Kennedy denied Petitioner's request for further DNA testing and found no merit to his allegations of evidence tampering. (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order dated July 2, 2003 at 10, 11.)

Nearly six months after Judge Kennedy issued his ruling, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. On February 5, 2004, the California Supreme Court denied Petitioner's claims on the merits and as

procedurally barred, finding that "[a]s with the previous five petitions for writ of habeas corpus that petitioner has filed in this court challenging the judgment, this petition casts no doubt on petitioner's guilt or the validity of the judgment." *In re Cooper*, Case No. S122389.

Petitioner then filed a request with the Ninth Circuit to file a successive habeas corpus petition in federal court. The Ninth Circuit granted this request on February 9, 2004, and remanded the successive petition to this Court.

STANDARDS OF REVIEW

I. The Antiterrorism and Effective Death Penalty Act of 1996

"[The Antiterrorism and Effective Death Penalty Act of 1996] AEDPA [ ] govern [s] any habeas appeal commenced after its effective date, April 24, 1996, without regard to when the petition was filed." *Cooper v. Calderon*, 255 F.3d 1104, 1107 (9th Cir.2001); *Cooper v. Calderon*, 274 F.3d 1270, 1272 (9th Cir.2001). In Petitioner's previous request to file a successive petition in 1998, the Ninth Circuit determined that AEDPA governed stating:

We must first determine whether AEDPA applies to Cooper's new petition. In *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1163-64 (9th Cir.2000), we held that AEDPA's provisions governing second or successive petitions apply to a new petition filed after the date of AEDPA's enactment, even if the original petition was filed before. Under *Villa-*

Gonzalez, we must apply AEDPA to Cooper's new petition.

Cooper, 274 F.3d at 1272.

Petitioner's third federal habeas corpus petition in this Court was filed on April 1, 2004, long after the effective date of AEDPA, April 24, 1996. As such, the provisions of AEDPA govern this latest habeas petition. *See Penry v. Johnson*, 532 U.S. 782, 792, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) ("Because [petitioner] filed his federal habeas petition after the enactment of [AEDPA], the provisions of that law govern the scope of our review."); *Lindh v. Murphy*, 521 U.S. 320, 326, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (AEDPA applies to all habeas petitions filed after April 24, 1996).

A. AEDPA's Standard for Habeas Relief

The Ninth Circuit's authorization which enabled Petitioner to file a successive habeas petition pursuant to 28 U.S.C. § 2244(b) with this Court does not relieve Petitioner of his burden of demonstrating compliance with those requirements before this Court. Petitioner's burden in seeking authorization from the Ninth Circuit was merely to make a prima facie showing of compliance with § 2244(b) for gatekeeper purposes. 28 U.S.C. § 2244(b)(3)(C). Now that he is before this Court, he must *918 actually show that each claim in his pending petition satisfies the statutory requirements. *Tyler v. Cain*, 533 U.S. 656, 661, n. 3, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). While the gatekeeper authorization allowed Petitioner to file any and all claims in a successive

petition upon a prima facie showing that any one claim satisfies the requirements of 28 U.S.C. § 2244(b), *Nevius v. McDaniel*, 104 F.3d 1120 (9th Cir.1996), Petitioner must now satisfy the requirements of 28 U.S.C. § 2244(b) as to each claim before that claim can be considered by this Court.

1. Claims Presented in a Prior Application are to be Dismissed

First, any claim "presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). The only exception that has been recognized by the Ninth Circuit to the requirement of dismissal for previously presented clams is in "extremely narrow circumstances" where the claim presented in the previous petition was held to be premature. *Babbitt v. Woodford*, 177 F.3d 744, 745(9th Cir.1999) (citing *Martinez-Villareal v. Stewart*, 118 F.3d 628, 630 (9th Cir.1997), *aff'd*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998)).

[8] A claim is not newly presented merely because the petitioner offers new factual bases in support of a legal claim that has already been raised. The Ninth Circuit held that it would not "consider new factual grounds in support of the same legal claim" that was previously presented, reasoning as follows:

A "ground is successive if the basic thrust or gravamen of the legal claim is the same, regardless of whether the basic claim is supported by new and

different legal arguments.... Identical grounds may often be proved by different factual allegations...."

Id. (quoting *United States v. Allen*, 157 F.3d 661, 664(9th Cir.1998)).

2. New Claims in a Successive Application Must Meet a Rigid Standard under AEDPA

Second, even if the claim has not been previously presented in a federal habeas petition, it must nevertheless be dismissed unless it falls within one of two narrow exceptions:

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(A)(B).

Petitioner does not rely on a new rule of Constitutional law, so his only possible claim is

under the newly discovered factual predicate prong. *See* 28 U.S.C. 2244(b)(2)(B).

***919 B. State Court Determinations Enjoy a Heavy Deference under AEDPA**

1. Factual Determinations, Both Express and Implied, Enjoy a Heavy Deference

Challenges to the state court finding of facts are governed by 28 U.S.C. § 2254(e)(I). As to factual determinations, "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The express and implied factual determinations by the state trial court and California Supreme Court are entitled to deference. "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); 28 U.S.C. § 2254(e)(1). "Clear and convincing evidence" within the meaning of § 2254(e) "requires greater proof than preponderance of the evidence" and must produce "an abiding conviction" that the factual contentions being advanced are "highly probable." *Sophanthavong v. Palmateer*, 378 F.3d 859, 866 (9th Cir.2004) (quotation omitted).

[10] The presumption of correctness applies not only to express findings of fact, but also applies equally to unarticulated findings that are necessary to the state court's conclusions of mixed questions of fact and law. *See Marshall v. Lonberger*, 459 U.S. 422, 433, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) (application of presumption to a credibility determination which was implicit in rejection of defendant's claim). Where there are two permissible views of the evidence, a fact finder's choice between them cannot be clearly erroneous. *Amadeo v. Zant*, 486 U.S. 214, 226, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988)

2. The State Court Legal Determinations Also Enjoy Heavy Deference

Because each of Petitioner's claims have been raised in the California Supreme Court and denied on the merits, this Court must apply the highly deferential standard set forth in AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 333, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

Title 28, United States Code, section 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). The standard provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

***920** (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

To obtain federal habeas relief, Petitioner must satisfy either § 2254(d)(1) or § 2254(d)(2). *See Williams v. Taylor*, 529 U.S. 362, 403, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The threshold question is whether the rule of law was clearly established at the time petitioner's state court conviction became final. *Id.* at 406, 120 S.Ct. 1495. Clearly established federal law, as determined by the Supreme Court of the United States "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state court decision." *Id.* at 412, 120 S.Ct. 1495; *see also Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). Ninth Circuit case law may be

"persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help us determine what law is 'clearly established.'" *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir.2000). Only after the clearly established federal law is identified can the court determine whether the state court's application of that law "resulted in a decision that was contrary to, or involved an unreasonable application of" that clearly established federal law. *See Lockyer*, 538 U.S. at 71-72, 123 S.Ct. 1166.

This Court must identify the relevant United States Supreme Court authority and then apply that law to the record in the light most favorable to the state court decision. Such an approach embodies the longstanding principle that unarticulated findings that are necessary to the state court's conclusions of mixed questions of fact and law are presumed correct. *See Marshall*, 459 U.S. at 433, 103 S.Ct. 843(application of presumption to credibility determination which was implicit in rejection of defendant's claim). Moreover, anything less deferential would undermine the law that federal courts "avoid attributing constitutional error to the state court." *Himes v. Thompson*, 336 F.3d 848, 854 (9th Cir.2003); *see also Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2003).

The "contrary to" and "unreasonable application" clauses contained in 28 U.S.C. § 2254(d) have distinct meanings. *Williams*, 529 U.S. at 404, 120 S.Ct. 1495. A decision is "contrary to" United States Supreme Court authority if it fails to apply the

correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but reaches a different result. *Id.* at 405-06, 120 S.Ct. 1495. A decision is an "unreasonable application" of clearly established federal law when the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts of that case. *Id.* at 407, 120 S.Ct. 1495. Under Williams, an application of federal law is unreasonable only if it is "objectively unreasonable." *Id.* at 409, 120 S.Ct. 1495.

Although the Ninth Circuit previously analyzed habeas cases for "clear error," the Supreme Court disapproved this approach. *Lockyer*, 538 U.S. at 75, 123 S.Ct. 1166 (rejecting *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir.2000)). Rather, when a petitioner does not challenge the state court's determination of the evidence, he may receive relief "only if" he establishes that the state court decisions were "contrary to, or involved an unreasonable application*921 of, clearly established federal law, as determined by the Supreme Court of the United States." *See Price v. Vincent*, 538 U.S. 634, 640-41 n. 2, 123 S.Ct. 1848, 155 L.Ed.2d 877 (2003).

When there is a federal question but no controlling Supreme Court authority on point, a state court's merits determination is not "contrary to" any decision within the meaning of the AEDPA. *Mitchell v. Esparza*, 540 U.S. 12, 17, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003). In the absence of controlling authority, federal courts should defer to a state court's reasonable interpretation of the Constitution.

Id. at 17-18, 124 S.Ct. 7; *Penry v. Johnson*, 532 U.S. 782, 795, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (holding that a Texas court's decision was not unreasonable where there was no squarely controlling authority).

"An unreasonable application of federal law is different from an incorrect application of federal law." *Williams*, 529 U.S. at 410, 120 S.Ct. 1495; *Clark v. Murphy*, 331 F.3d 1062, 1067(9th Cir.2003). A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state court decision is wrong. *See Bell v. Cone*, 535 U.S. 685, 698-99, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Williams*, 529 U.S. at 411, 120 S.Ct. 1495. The state court decision must be affirmed unless it is "objectively unreasonable." *Bell*, 535 U.S. at 699, 122 S.Ct. 1843; *Woodford*, 537 U.S. at 24, 123 S.Ct. 357. Where a state court finds a constitutional error to be harmless beyond a reasonable doubt, a federal court may not grant relief unless the state court's harmless error decision is objectively unreasonable. *Mitchell*, 540 U.S. at 12, 124 S.Ct. 7.

A state court's decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." *Miller*, 537 U.S. at 340, 123 S.Ct. 1029 (2003); 28 U.S.C. § 2254(d)(2); *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Even if the state court fails to cite or acknowledge United States Supreme Court authority, a federal court may not grant habeas relief unless the state court's reasoning or result contradict clearly established United States Supreme Court precedent. *Early*, 537 U.S. at 8, 123 S.Ct. 362. The Ninth Circuit has held that where there is no reasoned state court decision on one or more issues raised in the federal petition, the federal court must conduct an independent review of the record to determine whether the state court decision was contrary to, or an unreasonable application of, controlling United States Supreme Court precedent. *Delgado v. Lewis*, 223 F.3d 976, 982(9th Cir.2000). A federal court must "presume, of course, that state courts 'know and follow the law'[.]" *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir.2003) (citing *Woodford*, 537 U.S. at 24, 123 S.Ct. 357.) De novo review of a state court's adjudication is not appropriate. *Id.* at 854 n. 3.

The deference accorded to state court decisions by AEDPA is intended to prevent federal habeas "retrials" and ensures that state court convictions are "given effect to the extent possible under law." *Bell*, 535 U.S. at 693, 122 S.Ct. 1843; *see Clark*, 331 F.3d at 1067. The AEDPA deference standard demands that federal courts give state court decisions "the benefit of the doubt." *Woodford*, 537 U.S. at 24, 123 S.Ct. 357.

*922

II. Alternative Habeas Standards under *Schlup* and *Herrera*

Finally, if AEDPA does not apply to this successive petition, then the gateway claims presented by Petitioner are governed by *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) and the claims of actual innocence are governed by *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

The United States Supreme Court has held that a claim of actual innocence can be raised "to avoid a procedural bar to the consideration of the merits of [the petitioner's] constitutional claims." *Schlup*, 513 U.S. at 326-27, 115 S.Ct. 851.

To make a successful claim under *Schlup*, a petitioner must show that in light of all the evidence, including new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.

Cooper, 358 F.3d at 1119 (citation omitted.) To be reliable, a claim of actual innocence must be based on "new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup*, 513 U.S. at 324, 115 S.Ct. 851.

The Ninth Circuit did not decide whether the *Schlup* standard of actual innocence applies. The *Schlup* standard requires a showing that it "in light of all the evidence, including new evidence, it is more

likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," or whether the more stringent standard under 28 U.S.C. § 2244(b)(2)(B) applies, which requires a "factual claim [ ] not discoverable through the exercise of due diligence" that establishes by "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Cooper*, 358 F.3d at 1119-20 (citation omitted, emphasis in original).

In Petitioner's previous request to file a successive petition, the Ninth Circuit held that AEDPA governs a successive petition filed after the effective date of AEDPA. Therefore, the Court concludes that AEDPA applies to this successive petition.

But even if *Schlup* applies, the Court concludes that Petitioner has not established in light of all the evidence, including new evidence, that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. Under *Schlup*, if Petitioner meets his burden of establishing actual innocence, then the Court is to evaluate the alleged violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) or under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As stated by the Supreme Court in *Schlup*, it is only after a sufficient showing of actual innocence that the court is permitted to consider the other constitutional claims on the merits:

Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims. Schlup's claim of innocence is thus not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.... [I]f a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless ***923** constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Schlup, 513 U.S. at 315-16, 115 S.Ct. 851. The actual innocence exception should "remain rare" and "only be applied in the extraordinary case." *Schlup*, 513 U.S. at 321, 115 S.Ct. 851.

If AEDPA does not apply to Petitioner's claims of actual innocence, then Petitioner must meet the test of *Herrera*, which requires

> a truly persuasive demonstration of "actual innocence" ... [and] because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Herrera, 506 U.S. at 417, 113 S.Ct. 853. This "contemplates a stronger showing than insufficiency of the evidence to convict" or "doubt about his guilt." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir.1997). Under these standards, a petitioner must affirmatively prove that he is probably innocent. *Id.*

Moreover, *Herrera* requires that there is "no state avenue open to process such a claim." *Id.* In this case, the California Supreme Court denied Petitioner's actual innocence claims on the merits, (*see* Sixth State Habeas Pet. at 12-37; Answer, Ex. 13), and the Governor of California denied Petitioner's application for clemency.

But even if upon an evaluation of the merits of Petitioner's claims of actual innocence, the Court concludes that Petitioner has not meet his burden under AEDPA, which requires among other things, a "factual claim [ ] not discoverable through the exercise of due diligence" that establishes by "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b). For the same reasons, the Court also concludes that Petitioner has not met the requirements of Herrera, which requires an "extraordinarily high" showing of "a truly persuasive demonstration of 'actual innocence.'" *Herrera*, 506 U.S. at 417, 113 S.Ct. 853.

Title 28 U.S.C. section 2244(b)(3)(B) directs that "[a] motion in the court of appeals for an order authorizing the district court to consider a second of successive application shall be determined by a

three-judge panel of the court of appeals." According to the statute, only a three-judge panel is allowed to review an application for a successive petition. However, in this case, the en banc panel sua sponte granted Petitioner's application to file a successive petition under the authority of *Thompson v. Calderon*, 151 F.3d 918, 922 (9th Cir.1998).

III. State Procedural Bars Preclude Review

Petitioner has not established cause and prejudice as to any claim the state court found procedurally barred. When considering claims on habeas corpus, this Court must first address the state's argument that a claim is procedurally defaulted. *Lambrix v. Singletary*, 520 U.S. 518, 524, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997). Procedural defaults are resolved before Teague issues. *Id.* This is so even if the state court has also denied the claim on the merits. *Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir.2003).

***924** A federal court is precluded from reviewing the merits of a claim when the state court has denied relief on the basis of an independent and adequate state procedural default. *Coleman v. Thompson*, 501 U.S. 722, 731-732, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Vansickel v. White*, 166 F.3d 953, 957 (9th Cir.1999). The state procedural bar must be "independent" of the federal question and "adequate to support the judgment." *Coleman*, 501 U.S. at 729, 111 S.Ct. 2546. A state procedural rule constitutes an "adequate" bar to federal court review if it was "firmly established and regularly followed" at the time it was applied by the state court. *Ford v.*

Georgia, 498 U.S. 411, 423-424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991); *Poland v. Stewart*, 169 F.3d 573, 577 (9th Cir.1999). A state procedural rule constitutes an "independent" bar if it is not interwoven with federal law or dependent upon a federal constitutional ruling. *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir.2001).

Under the Ninth Circuit's decision in *Bennett*, 322 F.3d 573, once the state raises the existence of an independent and adequate state procedural ground as a defense, the petitioner must then raise "specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Bennett*, 322 F.3d at 584, 586(quoting *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir.1999)). Otherwise, Petitioner must establish cause and actual prejudice to avoid imposition of the bar. *Rich v. Calderon*, 187 F.3d 1064, 1066 (9th Cir.1999).

IV. *Brady v. Maryland*

In this successive petition, Petitioner alleges a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Under *Brady*, the prosecution's suppression of evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. 1194. The three components or essential elements of a *Brady* prosecutorial

misconduct claim are (1) favorable evidence (2) that is withheld by the prosecution (3) that results in prejudice:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.... Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is "material"
>
> for *Brady* purposes.... [T]he materiality standard for *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Banks v. Dretke, 540 U.S. 668, 691, 124 S.Ct. 1256 (2004) (quotations omitted).

Favorable evidence is material, and its suppression is unconstitutional, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the ***925** result of the proceeding would have been different." *United States. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Reasonable probability "is a

probability sufficient to undermine confidence in the outcome." *Id.*

Materiality "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The mere possibility that undisclosed information might have helped the defense, or might have affected the outcome of the trial, is insufficient to establish materiality in the constitutional sense. *Id.* at 109-10, 96 S.Ct. 2392. In addition, in order to be material information within the meaning of *Brady*, the undisclosed information or evidence acquired through that information must be admissible. *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir.1989). Petitioner must show how the information or evidence would be both material and favorable to his defense. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n. 15, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

V. Ineffective Assistance of Counsel

The clearly established United States Supreme Court law governing ineffective assistance of counsel claims is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Baylor v. Estelle*, 94 F.3d 1321, 1323 (9th Cir.1996) (stating that *Strickland* "has long been clearly established federal law determined by the Supreme Court of the United States"); *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir.1997). A habeas petitioner must satisfy two requirements to demonstrate his assistance of counsel was so defective that habeas relief is warranted. First, the petitioner must show that counsel's performance was deficient. *Strickland*,

466 U.S. at 687, 104 S.Ct. 2052. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show counsel's deficient performance prejudiced the defense. *Id.* The test for prejudice requires that the defendant show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. *Id.* at 694, 104 S.Ct. 2052. In other words, petitioner must demonstrate his counsel's error rendered the result unreliable or the trial fundamentally unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir.1987); *see Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. Petitioner must prove both elements. The court may reject his claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052.

In this third federal habeas petition, Petitioner repeats several issues and arguments raised in his trial, along with challenges already made on direct appeal and in prior post-conviction challenges. Petitioner cannot be heard with respect to claims that have already been adjudicated in his prior federal petition for habeas corpus relief. 28 U.S.C. § 2244(b)(1). Even if Petitioner presents a claim that

has not been previously adjudicated by this Court, he must demonstrate that the factual predicate for the claim could not ***926** have been discovered previously with due diligence; and he must also show by clear and convincing evidence that if the facts underlying his claim are proven, and viewed in light of the evidence as a whole, no reasonable factfinder would have found him guilty. 28 U.S.C. § 2244(b)(2). In addition, in order for the Court to consider his constitutional claims, Petitioner must show it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 327, 115 S.Ct. 851. As to each of his claims, Petitioner must demonstrate compliance with the requirements of 28 U.S.C. § 2244(b).

DISCUSSION

Petitioner is on death row because he is the person who brutally chose to slaughter a father, a mother, and two children in the sanctity of the Ryen home, and leave another child barely clinging to life. The post-conviction DNA testing has confirmed Petitioner's guilt, and the Court rejects Petitioner's claims on the merits. After having conducted mitochondrial DNA testing and EDTA testing, reviewed the parties' papers, heard from testimony from forty-two experts and witnesses, reviewed numerous exhibits, considered the prior record, and listened to the parties' oral arguments, the Court **DENIES** Petitioner's petition pursuant to 28 U.S.C. §§ 2254 and 2244, and on all grounds, including *Schlup v. Delo*, *Herrera v. Collins*, *Brady v. Maryland*, and *Strickland v. Washington*.

I. Ninth Circuit's En Banc Decision Regarding Mitochondrial DNA Testing and EDTA Testing

Petitioner's successive petition challenges the post-conviction DNA evidence of guilt by alleging that his blood was planted on a T-shirt, Trial Exhibit 169, and that further testing of hairs would reveal the assailant. Based on representations made by Petitioner regarding scientific testing capabilities, the Ninth Circuit en banc panel stated:

> In his brief to us, Cooper states, "Through readily available mitochondrial testing of blond hairs found in one of the victim's hands, and testing for the presence of the preservative agent EDTA on a T-shirt[ ] the State belatedly claimed contained Mr. Cooper's blood, the question of Mr. Cooper's innocence can be answered once and for all."
>
> The district court may be in a position to resolve this case very quickly. As soon as Cooper's application is filed, it should promptly order that these two tests be performed in order to evaluate Cooper's claim of innocence.

Cooper, 358 F.3d at 1124.

Therefore, on February 9, 2004, the Ninth Circuit issued an en banc decision that allowed Petitioner to file a second or successive habeas corpus petition in this Court. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir.2004). Specifically, the Ninth Circuit stated that Petitioner's guilt may be resolved through two scientific tests: (1) mitochondrial DNA testing of

hairs found on the victims, and (2) testing of the T-shirt for EDTA preservative. *Id.* at 1123-24.

II. Mitochondrial DNA Testing Fails to Establish that the Hairs in the Hands of Jessica Ryen are from Other Potential Assailants

The Court conducted mitochondrial DNA testing of hairs found in the hands of the victims pursuant to the Ninth Circuit order. After remand, the Court held a tutorial on April 2, 2004 regarding mitochondrial*927 DNA and EDTA testing. Dr. Terry Melton, President and CEO of Mitotyping Technologies, LLC; Dr. Kevin Ballard, Director of Analytical Toxicology of National Medical Services; and Dr. Peter DeForest,[5] a criminalist, participated as Petitioner's experts. Dr. Eva Steinberger, Assistant Chief for New Programs at the California Department of Justice participated as Respondent's expert. (4/2/04 HRT.) On June 3-4, 2004, the Court held an evidentiary hearing where Dr. Edward Blake, Dr. John Thornton and Mr. Steven Myers testified regarding previous examination of the hair evidence for nuclear DNA testing in 2001. Dr. John Thornton was a criminalist who was Petitioner's expert at trial. Dr. Edward Blake was Petitioner's expert during the post-conviction DNA testing. Steven Myers is a Senior Criminalist at the California Department of Justice Bureau of Forensic Services who was involved in the post-conviction DNA testing.

---

[5] Dr. DeForest appeared telephonically at the tutorial.

A. Post-Conviction DNA Testing of the Hairs

At the evidentiary hearing, Dr. Blake and Mr. Myers testified regarding work conducted during the post-conviction DNA testing and forensic examination of the hair evidence. *(See* 6/03/04 HRT 135-178; 6/4/04 HRT 28-111.) In connection with the hearing, Dr. Blake submitted a report detailing the previous forensic hair examination for post-conviction DNA testing. (04-CV-656, Dr. Blake's Report detailing Previous Examination and Current Evaluation of the Hair Evidence dated 6/04/04, Doc. No. 161 ("Dr. Blake's Report").)

In post-conviction DNA testing in 2001, the hair was examined by highly qualified scientists for suitability for nuclear DNA testing at the Department of Justice DNA Laboratory in Richmond, California. (Dr. Blake's Report at 2-18; 6/3/04 HRT 134-165; 6/4/04 HRT 31-91; 2 State Evidentiary Hr'g Reporters' Tr. ("SEHRT")[6] 253-54.) The selection and documentation of biological specimens suitable for DNA testing, including hair, was done by Petitioner's expert, Dr. Blake, DOJ Laboratory Director Gary Sims, and Mr. Myers. (Dr. Blake's Report at 2-18; Joint DNA Testing Agreement, ¶ 2.10.) Dr. Blake and Mr. Myers looked at approximately 1,000 hairs visually and

---

[6] Reporters' Transcripts of an evidentiary hearing before Judge Kennedy of the San Diego Superior Court in 2003 are designated by a "SEHRT" and are lodged with the Court in *Cooper I*, 92-CV-427, NOL filed Feb. 3, 2004, Reporter's Tr., Vols. 1-3 dated June 23, 24 and 25, 2003 before Hon. William H. Kennedy in Case No. CR-72787.

microscopically. (Dr. Blake's Report at 6-7; 6/3/04 HRT 140-41; 6/4/04 HRT 33-34; 2 SEHRT 275, 280.) All of the hairs were examined using a stereomicroscope. Selected hairs were mounted in order to be viewed under a compound microscope, which provides a higher magnification. (Dr. Blake's Report at 6-7; 6/3/04 HRT 157; 6/4/04 HRT 33-37; 2 SEHRT 278, 300.) There were only three hairs possessing anagen roots that were identified by Dr. Blake and Mr. Myers for nuclear DNA testing.[7] (Dr. ***928** Blake's Report at 7-17; 6/3/04 RT 140-41; 6/4/04 RT 33-37; 2 SEHRT 281.) These hairs were two human hairs collected from Doug Ryen's right hand and a human hair collected from Chris Hughes' arm. (Dr. Blake's Report at 17; see also 2 SEHRT 281.) The results of the DNA testing of the there hairs were unsuccessful because no DNA was detected. (Dr. Blake's Report at 17; 6/3/04 RT 148, 156.)

Dr. Blake confirmed that the focus of the examination of the hair in 2001 was to "identify, if possible, hairs recovered from the hands of the Ryen/Hughes victims that possessed the properties

---

[7] "Hairs that are forcefully removed from the skin typically possess ribbon-like or club-like root structures and a coating of root sheath cells ... [and] called anagen roots. Hairs that have this type of root structure contain moderate levels of nuclear DNA. When hair with this type of root structure also possesses root sheath cells, the nuclear DNA levels may be quite large. Hairs that naturally fall out of the skin after the hair root cells die and atrophy typically have the shape of the tip of a Q-tip swab; hair roots with this type of root structure are called telegen roots. These hair roots do not possess any significant amount of nuclear DNA.... Hair shafts and all hair roots contain at least some level of detectable mitochondrial DNA." (Dr. Blake's Report at 6-7.)

of hair forcefully removed from the skin that would be expected to be successful in a PCR based DNA analysis of nuclear genes." (10 Resp. Evidentiary Hr'g Ex. VV at 6; *see* Dr. Blake's Report at 7; 6/4/04 HRT 33-37.)

Dr. Blake and Mr. Myers spent six days examining the hairs removed from the hands of the victims in an effort to find hairs with anagen roots. (6/3/04 HRT 157-158.) As Dr. Blake explained, during this forensic examination of the hair, Dr. Blake and Mr. Myers were looking for pulled hairs from the hands of the victims and the arm of Christopher Hughes so that they could potentially identify the assailant: "For the fairly obvious reason that we were looking for here are hairs that may have come from the bad guy or guys. So cut or broken hairs don't fall into that category." (6/4/04 HRT 38.) The examination of the hairs in 2001 by Dr. Blake and Mr. Myers revealed only three anagen hairs. (Dr. Blake's Report at 17; 6/3/04 HRT 140-41; 6/04/04 HRT 34-37; 2 SEHRT 281.)

As Dr. Blake's report detailing the previous examination and evaluation of the hair evidence explains, there is no evidence to support the theory that hairs were pulled from the assailant during the murders:

> Hairs jerked from the scalp are expected to posses anagen root structures and also frequently possess root sheath material at the hair root end.
>
> ...

> The vast majority of the hairs associated with the hands of the Ryen/Hughes victims of either broken or cut human hairs or animal hairs.
>
> ...
>
> Since the vast majority of the hairs associated with the hands of the Ryen/Hughes are either cut or broken human hairs or animal hairs, there is no evidence to support the assertion that these hairs were pulled from the scalp of an assailant or assailants.
>
> (Dr. Blake's Report at 17-18.)

From the previous forensic examination of the hairs by Dr. Blake and Mr. Myers, three hairs possessing anagen roots were found and were tested for DNA extraction and analysis. No human DNA was recovered from these hairs. (Dr. Blake's Report at 17.)

B. Mitochondrial DNA Testing Results

At the tutorial, Dr. Terry Melton, Petitioner's mitochondrial DNA expert, testified that mitochondrial DNA testing is different from nuclear DNA testing. (4/2/04 HRT 19-25.) With nuclear DNA testing, it is possible to match with a high degree of specificity an unknown sample of nuclear DNA to a reference sample of nuclear DNA. This is because, except for twins, nuclear DNA is unique to the individual. (4/2/04 HRT 19.) In contrast, mitochondrial DNA found in the hair is inherited maternally and is shared by all maternal *929

relatives. (4/2/04 HRT 19.) For this reason, mitochondrial DNA testing is not able to conclusively identify the source of the hairs, but rather serves as an exclusionary tool to rule out certain individuals as a possible donor of the hair:

> [Mitochondrial DNA is] inherited from the mother. And all siblings of that mother will have the same type. The mother will have the same type as her mother and her grandmother and so forth. So, the primary difference between nuclear and mitochondrial DNA, when it applies to forensics, is that it is not a unique identifier.... It is a maternal lineage identifier....
>
> (4/2/04 HRT 19-25.)[8]

After considering the extensive post-conviction hair analysis done by Petitioner's expert and the testimony of Dr. Melton, Dr. Blake and Dr. Thornton, the Court ordered mitochondrial DNA

---

[8] Consistent with Dr. Melton's testimony and verified by Dr. Edward Blake (6/4/04 HRT 59), Mr. Steven Myers testified that up to seven percent of the Caucasian population have the most common mitochondrial DNA sequence. (6/3/04 HRT 159.) Because mitochondrial DNA is unable to match an unknown mitochondrial DNA type to a particular individual with an acceptable degree of certainty, this testing is not able to positively identify the assailant of the Ryen/Hughes murders as contemplated by the Ninth Circuit en banc order permitting a second or successive petition. In fact, mitochondrial DNA testing cannot even positively identify whether any of the hairs are from one of the victims since maternal relatives share a common mitochondrial DNA type. What the mitochondrial DNA testing may do, however, is exclude people not sharing the mitochondrial DNA type found in the tested hairs.

testing. The Court authorized Petitioner's expert, Dr. Peter De Forest to select ten hairs that were recovered from Jessica's right and left hands and to select, as a control, one animal hair covered with blood from the hair evidence sent from the DOJ DNA Laboratory. *(See* 6/4/04 Order Re Mitochondrial DNA Testing, 04-CV-656, Doc. No. 75.) In addition, the Court ordered testing of the two remaining hairs identified in the 2001 post-conviction DNA testing as having anagen roots, D-4A (one hair from the right hand of Doug Ryen), E-1A (one hair from the arm of Chris Hughes) and D-4C,[9] (one hair from the right hand of Doug Ryen). *(See* 04-CV-656, Doc. No. 75, Order RE Mitochondrial DNA Testing, filed 6/4/04.)

On August 2, 2004, Dr. Melton submitted a report regarding the results of the mitochondrial DNA testing. (04-CV-656, Doc. No. 155, Mitochondrial DNA Testing Report ("Dr. Melton's Report").) According to the report, the hairs contained in Jessica Ryen's hands were either animal hairs or hairs from Jessica herself or from someone maternally related to her. (Dr. Melton's Report at 6-8.) Two of the ten hairs selected by Dr. DeForest, Petitioner's expert, were from domestic dogs. (Dr. Melton's Report at 3.) The results confirmed that Jessica Ryen, Peggy Ryen, and Josh Ryen and their maternal relatives could not be excluded as the donors of the tested hairs, including the hairs found in Jessica Ryen's hand. (Dr. Melton's Report at 6-8.)

---

[9] It was acknowledged that D-4B was consumed in nuclear testing and had no root. Therefore, the Court allowed testing of D-4C, a hair with a telogen root structure. (6/4/04 HRT 112.)

Six days of hair analysis in post-conviction DNA testing plus mitochondrial DNA testing of hairs have been conducted to address Petitioner's claim that a third-party assailant committed the crime.[10] This ***930** Court has responded fully to the concern expressed by the Ninth Circuit regarding mitochondrial DNA testing of the blond or light brown hair in Jessica's left hand. In fact, this Court allowed Petitioner to test hairs from both of Jessica's hands. The Court also permitted the testing of two hairs from Doug Ryen's right hand and one hair from Christopher Hughes. The testing failed to identify another assailant and confirmed that all tested hairs most likely came from one or more of the victims.

This should not be surprising. The hairs adhered to the victims' bodies, including their hands, because there was a large amount of blood on the victims and a large amount of hair on the debris-ridden carpet. Also, the victims each sustained hatchet wounds to the head, causing clumps of cut hair to fall to the ground. Both animal and human hair were recovered from the hands of the victims. Just as with the animal hairs, the cut and shed human hairs adhered to the bloodied victims' hands because the victims came in contact with the carpet when they were dying on the floor. In this case, both the state and federal courts have thoroughly reviewed the

---

[10] Mitochondrial DNA analysis of one hair costs $2,500. In total, analysis of the fourteen hairs cost approximately $50,000 which includes testing and analysis by Dr. Melton, who conducted the mitochondrial DNA testing and Dr. De Forest, who selected the hairs.

evidence, making reasoned decisions that the evidence of Petitioner's guilt is overwhelming. The Court concludes that mitochondrial DNA testing has failed to show that someone other than Petitioner committed the murders.

C. Ineffective Assistance of Counsel Regarding Hair Evidence

Petitioner claims he received ineffective assistance of counsel regarding counsel's failure to introduce photographic evidence regarding the hair evidence. Petitioner's claim does cannot satisfy the requirements of 28 U.S.C. 2254 or § 2244(b). The examination of the hairs in 2001 by Dr. Blake and Mr. Myers revealed no pulled hairs, let alone clumps of pulled hairs, in the hands of the victims. (Dr. Blake's Report at 17-18; 6/3/04 HRT 140-41; 6/4/04 HRT 34-37.)

Pursuant to this successive petition, the Court ordered mitochondrial DNA testing of hair evidence. The mitochondrial testing results show that Jessica Ryen, Peggy Ryen, and Josh Ryen and their maternal relatives cannot be excluded as the donors of the tested hairs, including the hairs found in Jessica Ryen's hand. (Dr. Melton's Report at 6-8.) Thus, Petitioner's "clutching" theory has no merit and is not a proper basis of an ineffective assistance of counsel claim. Accordingly, the Court **DENIES** this claim on the merits and under 28 U.S.C. § 2244(b).

1. The Court DENIES the Claim of Ineffective Assistance of Counsel Regarding Hair Evidence

This Court accords deference to the California Supreme Court decision denying Petitioner's claim on the merits. 28 U.S.C. § 2254(d). The state court's denial of Petitioner's claim on the merits is not contrary to federal law as enunciated by the United States Supreme Court in *Strickland* and does not rest on an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d). As both the California Supreme Court and this Court have already expressly found, Petitioner " 'received an extraordinarily vigorous and able defense.'" *Cooper I,* 92-CV-427, Aug. 25, 1997 Order at 8 (quoting *Cooper*, 53 Cal.3d at 824, 281 Cal.Rptr. 90, 809 P.2d 865). Defense trial counsel's extensive educational background and prior litigation experience were developed in the evidentiary hearing before this Court in *Cooper I,* 92-CV-427, Aug. 25, 1997 Order ***931** at 8. Moreover, both this Court and the California Supreme Court found the combination of evidence of Petitioner's guilt to be overwhelming. *Cooper I,* 92-CV-427, Aug. 25, 1997 Order at 8 (quoting *Cooper*, 53 Cal.3d at 836, 281 Cal.Rptr. 90, 809 P.2d 865). Accordingly, the California Supreme Court's decision rejecting the merits of Petitioner's claim is not contrary to federal law, nor an unreasonable determination of the facts, since defense counsel was not deficient, nor was Petitioner prejudiced by his attorney's failure to pursue an erroneous theory. This Court therefore **DENIES** this claim pursuant to 28 U.S.C. § 2254(d).

2. Petitioner Does Not Satisfy the Requirements of § 2244(b)

If Petitioner has previously adjudicated a claim of ineffective assistance of counsel in this Court, his pending claim of ineffective assistance of counsel must be dismissed. 28 U.S.C. § 2244(b). New factual grounds in support of a legal claim that has already been presented, i.e., ineffective assistance, are not sufficient to evade the mandatory dismissal requirement of 28 U.S.C. § 2244(b). *See Babbitt*, 177 F.3d at 746. Petitioner already complained about his defense trial counsel's performance in a myriad of claims of ineffective assistance of trial counsel in his first habeas corpus petition, *Cooper I*, 92-CV-427, Suppl. Pet. at 63-147, all of which were denied on the merits by this Court. *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 7-33. The gravamen of the claim of ineffective assistance of trial counsel is the same, regardless of whether Petitioner presents new and different legal arguments or different factual allegations. *See Babbitt*, 177 F.3d at 746. Petitioner made allegations about trial counsel unreasonably failing to advocate regarding forensic evidence. *(See Cooper I*, Suppl. Pet. at 121-141.) The thrust of Petitioner's attack on his defense counsel's failure to advocate regarding the evidence of the hair in the victims' hands is the same here. The Court therefore **DENIES** this claim pursuant to 28 U.S.C. § 2244(b).

Petitioner's claim is also **DENIED** because he could have presented the legal and factual basis of his claim previously with due diligence in the first petition. 28 U.S.C. § 2244(b). That hair was recovered from the victims' hands was a fact known

to the defense before and throughout the trial. (Answer, Ex. 103 (defense trial file).) Hair evidence was collected from the victims during the autopsy and provided for examination to Petitioner's defense trial expert Dr. Thornton, then a practicing criminalist and forensic science professor.

Assuming arguendo that Petitioner could demonstrate that the factual and legal basis of his claim could not have been discovered previously with due diligence, he would still be required to demonstrate that the facts underlying his claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him guilty of the Ryen/Hughes murders. 28 U.S.C. § 2244(b). Petitioner does not meet this standard. The guilt of Petitioner was demonstrated by overwhelming evidence at trial and reaffirmed through post-conviction DNA testing. Moreover, the mitochondrial DNA testing failed to substantiate his theory of another assailant. Accordingly, the Court **DENIES** his claim of ineffective assistance of counsel.

III. EDTA Testing

At trial, Petitioner introduced a T-shirt (Trial Exhibit 169) found within two miles ***932** from the crime scene into evidence in support of his claim that it belonged to the real killer. (Trial Ex. 169; 87 RT 3065; 105 RT 7587). This exhibit was never used by the prosecution at trial as incriminating evidence, but solely by the defense. As a result, the

prosecution at trial did not link the T-shirt to Petitioner's judgment of conviction and sentence of death.

The T-shirt was subject to DNA testing in 2001 at Petitioner's request. The results of the DNA testing indicated that blood on the T-shirt belonged to Petitioner and the victims. These DNA tests were done pursuant to a Joint DNA Forensic Testing Agreement entered on May 10, 2001. (Joint DNA Agreement dated May 10, 2001.)

These results provide strong evidence of Petitioner's guilt. Specifically, as to the T-shirt, the joint DNA testing report found the following:

> a bloodstain on a tee shirt found on the side of a road within two miles of the Ryen home had DNA matching Cooper's and partial DNA profiles matching that of two of the victims, Doug and Peggy Ryen. The DNA matching Cooper's found on the t-shirt occurs at random in the population with a frequency of about 1 in 110 million for African Americans, 1 in 16 million for Caucasians, and 1 in 12 million for Western Hispanics.

(Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 1-4.)

Faced with the overwhelming evidence confirming Petitioner's guilt obtained from the agreed-upon post-conviction testing, Petitioner claimed to the Ninth Circuit that the blood on the T-shirt had been planted. Based on the last-minute

representations made by Petitioner regarding scientific testing capabilities, the en banc panel of the Ninth Circuit concluded:

> First, Cooper asks that the blood on the t-shirt be tested for the presence of the preservative EDTA. The presence of such a preservative would show that his blood was not on the t-shirt at the time of the killings, but was rather placed there at some later time.
>
> *Cooper*, 358 F.3d at 1124.

In a separate concurring opinion, Judges Silverman and Rawlinson observed as follows:

> If the blood was planted, [Cooper] says, it will reflect a high level of EDTA, a preservative agent contained in the vial in which the blood was stored. A high level of EDTA will show that the blood came from the vial rather than directly from him, proving that the police tampered with evidence in an effort to frame him. Conversely, if the blood is not contaminated by EDTA, the shirt conclusively proves his guilt.... Since Cooper's guilt can be quickly and definitively determined by means of a simple test, there is no reason not to have it performed prior to his execution.
>
> *Id.* at 1125.

Petitioner represented to the Ninth Circuit that Dr. Ballard and his lab could perform a scientific test that would reveal whether tampering with the blood

on the T-shirt had occurred. According to Dr. Kevin Ballard's declaration:

> NMS [National Medical Services] and myself specifically can perform the EDTA test to determine whether the blood on the T-shirt ... had been previously stored in a test tube containing EDTA.

(Petitioner's Application to the Ninth Circuit, Appendix No. 42 at 3, 10.)

On remand, this Court complied with the Ninth Circuit's order to test the T-shirt for ***933** elevated levels of EDTA to determine whether tampering occurred. Now, over one year after the remand, the process has not been "quick," as Petitioner promised. Nevertheless, the tests have not supported Petitioner's theory of evidence tampering. Tests performed by Petitioner's chosen expert, Dr. Ballard, failed to find elevated levels of EDTA in the subject stain. These results confirm that Petitioner's tampering theory lacks merit, and supplement the already overwhelming evidence of Petitioner's guilt in the murders of the Ryen family and Christopher Hughes.

A. Development of the EDTA Testing Protocol

On April 2, 2004, the Court held a tutorial presented by the parties which addressed EDTA testing. Dr. Ballard participated in the tutorial for Petitioner and Dr. Eva Steinberger participated in the tutorial for Respondent. Both experts testified

that the known concentration in one microliter of blood from a purple-topped tube[11] was 1300 nanograms.[12] *(See* 4/2/04 HRT 54, ll. 22-25; 113, l. 9.)

Based on the recommendations of the parties, the Court adopted a "control" method of testing in which the amount of EDTA detected in a stain would be compared to the amounts of EDTA found in various control swatches from other non-stained portions of the T-shirt. This method was proposed by Dr. Ballard and by Mr. Marc LeBeau, Chief of the Chemistry Unit of the FBI Laboratory in Quantico, Virginia. (04-CV-656, Doc. No. 51, Ballard Decl. ¶ 3; Doc. No. 23, Ex. 2, LeBeau Decl. ¶¶ 7-10.) Dr. Ballard agreed that "while it is always helpful if it is possible to measure the amount of blood,[13] it is actually not necessary because there are ways to determine whether or not EDTA findings are meaningful, specifically through the appropriate use

---

[11] Petitioner alleged a theory of tampering involving blood from a purple-topped tube. (04-CV-656, Doc. No. 97 at 8.) Following his arrest for the murders, Petitioner's blood was drawn into a purple-topped tube for the San Bernardino County Sheriff's Crime Lab. *(Id.)* This purple-topped tube contains only EDTA as a preservative. *(Id.)* The San Bernardino County Sheriff's crime lab records do not reflect the receipt of any other samples. *(Id.)*

[12] A nanogram is one billionth of a gram, a microgram is one millionth of a gram, and a milligram is one thousandth of a gram. Similarly, a microliter is one millionth of a liter, or one thousandth of a milliliter. (Tutorial Tr., April 2, 2004, at 55, ll. 11-24.)

[13] Dr. Ballard had offered to "eyeball" the volume of blood in a subject stain. (4/2/04 HRT 123.) For obvious reasons, Dr. Ballard's "eyeball" measurement of blood volume was not acceptable to the Court.

of unstained control specimens from the same evidence item." (04-CV-656, Doc. No. 51, Ballard Decl. ¶ 3.) Because blood does not naturally contain any EDTA,[14] the EDTA levels in the stain and the background material should be comparable. If the EDTA found in the stain greatly exceeded the amount of the EDTA found in the background material, Petitioner and Dr. Ballard advanced that it may support a theory of planting. In this case, there appeared to be an adequate area for control testing in the T-shirt, so that a control method of comparison of relative levels of EDTA could theoretically be done consistent with the Ninth Circuit order to conduct EDTA testing.

The Court reserved judgment on the admissibility of the test results under ***934** *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and ordered briefing and a hearing to address the admissibility of EDTA evidence. *(See* 04-CV-656, Doc. Nos. 95 & 7.) Respondent vigorously maintained that any EDTA testing ran afoul of *Daubert*. After briefing was submitted by the parties, on June 17, 2004, the Court denied without prejudice Respondent's motion regarding inadmissibility of the EDTA evidence and reserved the right to later rule on the admissibility of the EDTA testing evidence under *Daubert*. (04-CV-656, Doc. No. 97.)

The EDTA protocol was developed by the parties and the Court over a three-month period. By

---

[14] EDTA is not a naturally occurring molecule. It is a synthetic chemical that was patented in 1935. (4/2/04 HRT 54.)

invitation of the Court, Petitioner filed the proposed protocol on June 4, 2004,[15] and Respondent filed its opposition on June 29, 2004. Respondent objected that Petitioner's proposed testing of "any areas that appear to contain blood that have not previously been tested and, if possible, the remainder of any stains previously tested" was vastly overbroad. (04-CV-656, Doc. No. 106 at 1.) The Court agreed that such expansive testing was not warranted under Petitioner's own theory. Because Petitioner's theory was that all stains containing his blood were planted, testing of any one of his known blood stains from the post-conviction DNA testing should confirm or disprove Petitioner's guilt.

The Court ordered Petitioner to submit a more detailed revised proposed protocol for EDTA testing, which Petitioner filed on July 13, 2004. Respondent was then ordered to submit a response, which Respondent filed on July 27, 2004. Petitioner filed a reply to Respondent's response on August 4, 2004. At the hearing on August 13, 2004, the Court ordered that the parties meet and confer regarding the EDTA protocol and report back to the Court on August 24, 2004. The Court held additional status conferences to revise the EDTA testing protocol with the parties on August 25, 26, and 27, 2004 and September 3 and 7, 2004 to finalize the EDTA testing protocol and discuss EDTA testing procedures.

---

[15] The Court authorized over thirty hours for Petitioner to consult with Dr. Ballard prior to June 4, 2004, and twenty additional hours thereafter. In addition, the Court authorized $12,063 for Dr. DeForest.

Petitioner consulted with experts for the development of the protocol. For example, at a status conference on August 26, 2004, the Court provided the parties with a copy of its proposed testing order and offered that "[w]e could just go through it right now and get your comments ... [and] incorporate it." (8/26/04 HRT 209, ll. 17-18.) Petitioner declined and asked for an additional day to review the proposed order so that he could consult with Drs. De Forest and Ballard "to make sure that they don't see any issues[.]" (8/26/04 HRT 210, ll. 1-3.) At that time, an issue also arose as to the appropriate buffer solution to use in testing, methanol or phosphate buffered saline ("PBS"). Before any decision was made regarding the buffer solution, Petitioner's counsel requested and was granted permission to consult with Dr. Ballard. (8/26/04 HRT 207, ll. 13-15.) On August 27, 2004, in another telephonic conference in which the parties had the opportunity to comment on the proposed order, Petitioner's counsel explained that PBS rather than methanol was the appropriate buffer, based on his consultations with his experts: "[Dr. De Forest] actually expressed concern about the methanol issue and the like, and he gave me a long discussion about it, and it was enough chemistry ***935** for me." (8/27/04 HRT 2, ll. 15-18.) Based on this recommendation, the Court adopted PBS as the appropriate buffer solution for the EDTA protocol.

The record is replete with examples where Petitioner's counsel represented to the Court that he was consulting with his experts on the details of the EDTA protocol. (*See, e.g.*, 8/27/04 HRT 7, ll. 12-19 ("I'd have to defer to ... De Forest on that and ... Dr.

Ballard."); 5/12/04 HRT 45, l. 25; 8/26/04 HRT 202, ll. 7-11; 9/3/04 HRT at 8-9.)

Following this extensive dialogue with the parties, on Aug. 27, 2004, the Court issued an EDTA testing order detailing the procedure for EDTA testing to be conducted on the T-shirt.[16] In the original EDTA testing order, Petitioner's criminalist, Dr. Peter De Forest, was designated to select the appropriate area of stain 6G for testing and to select the appropriate control areas around 6G and to perform the extraction. *(See* 04-CV-656, EDTA Testing Order filed August 27, 2004.) The Court selected 6G because previous DNA testing had indicated that 6G contained Petitioner's blood as the sole, or major donor and further nuclear DNA testing could potentially be avoided. The Court recognized that any testing should resolve Petitioner's theory of tampering, which asserts that all blood from Petitioner found on the T-shirt is necessarily planted.

After working with the parties for three months to develop the EDTA testing order, the Court scheduled the testing to begin on September 7, 2004. On the evening of September 3, 2004, the Friday before testing was to begin the following week, Dr. De Forest informed the Court via fax that he did not wish to continue working on this case based on the

---

[16] At no time during this three-month period did Petitioner suggest the inclusion of presumptive blood testing as part of the EDTA testing protocol, even for the control areas. In fact, Petitioner's expert at the time, Dr. DeForest, recognized the protocol as "unusually detailed" in his letter dated July 20, 2004. (*See* 04-CV-656, De Forest Ltr. dated 7/20/04.)

court-ordered protocol. Dr. De Forest stated that he would "not agree do (sic) any sampling according to this protocol" and that "unless [he] ha[d] the freedom and flexibility to design the sampling protocol in conjunction with a criminalist representing the prosecution, [he] d[id] not wish to continue." (04-CV-656, Ltr. from Dr. Peter R. De Forest to Court dated Sept. 3, 2004 filed under seal on Nov. 9, 2004.)

Therefore, on September 7, 2004, the Court held a status conference concerning the selection of another expert and laboratory to conduct the extraction part of the testing. During that conference, the Court permitted the parties to suggest alternative labs of their choosing but stated that "[i]n the absence of an agreement, I will choose Selmark (sic), a reputable lab, to just do the prep." (9/7/04 HRT 6, ll. 12-14.) At that time, Respondent stated "we have no objections to Selmark (sic). We consider it to be a well-qualified and respected lab." (*Id.* at 7.) Petitioner also agreed that Cellmark is "very highly qualified" with a "very high reputation." (*Id.* at 13, l. 15.) Dr. Lewis Maddox of Cellmark was designated to conduct the extraction, with Dr. Ballard and Dr. Gary Suizdak, Associate Professor and Senior Director of the Mass Spectrometry Lab at the Scripps Research Institute, to do separate EDTA testing. (*Id.* at 22.) On September 7, 2004, the Court issued an amended EDTA Testing Order addressing the change in experts replacing Dr. De ***936** Forest with Cellmark to conduct the extraction, and retaining Dr. Ballard as Petitioner's chosen expert for the EDTA testing.

B. Administration of the EDTA Test

On September 13, 2004, Cellmark's Dr. Maddox and Respondent informed the Court that area 6G had been consumed in prior testing and was not suitable for EDTA testing and requested the Court's guidance.[17] The Court ordered Dr. Maddox, in consultation with Mr. Steven Myers,[18] to select an appropriate stain area and to prepare it for EDTA testing in accordance with the Amended EDTA Testing Order filed September 7, 2004. *(See* 04-CV-656, Doc. No. 235.) Prior post-conviction DNA testing done by Petitioner's expert and Respondent showed that areas 6J and 6K "were consistent with having Kevin Cooper as a clear majority contributor." (Resp't Opp. to Motion for Order Re EDTA Testing, Ex. A ¶ 14.) Therefore, Dr. Maddox, in consultation with Mr. Myers selected an area between stains 6J and 6K.[19] *(Id.)*

---

[17] Petitioner's post-conviction experts also knew that area 6G had been consumed in prior testing. In good faith, both sides mistakenly thought that 6G was still available.

[18] The Court declined to fund a third expert on the short notice following Dr. DeForest's decision not to participate. This additional expenditure was not approved as part of the budget required to be submitted to the Court, the Ninth Circuit Capital Committee and the Judicial Council. Petitioner had already agreed to Cellmark as a "very highly qualified" and "very well respected" substitute (9/7/05 HRT 13, l. 15), and Dr. Maddox of Cellmark participated in the selection. Moreover, the stain selected by Dr. Maddox and Mr. Myers had previously been identified by Petitioner's DNA expert as having Petitioner as the major donor.

[19] This was a logical choice. Because Petitioner's claim is that only his blood was planted, this theory would be most

After the extraction was completed, the vials containing the samples were shipped to Dr. Ballard and Dr. Suizdak to conduct double-blind EDTA testing. The test results were submitted to the Court on October 4, 2004. The Court issued an order regarding the EDTA test results and provided the reports of Drs. Maddox, Ballard and Suizdak to the parties. On October 29, 2004, Petitioner and Respondent filed their respective analyses of the EDTA test results. On November 5, 2004, Respondent filed a response to Petitioner's analysis of the EDTA test results and Petitioner filed a response to Respondent's analysis of the EDTA test results on November 8, 2004.

On November 15, 2004, the Court held a hearing concerning EDTA testing results of the T-shirt. The parties agreed that DNA testing was required to determine whether the main stain fabric cut-out from the EDTA testing contained Petitioner's blood.[20] Petitioner and Respondent concurrently filed a proposed protocol for DNA testing on November 8, 2004 and both parties filed responses on November 12, 2004. On November 19, 2004, the ***937** Court held a telephonic hearing about the proposed DNA protocols. After discussion with the parties, the

---

relevantly explored by testing an area known to contain Petitioner's blood. As Dr. Ballard has previously testified, "Once EDTA is extracted from a sample, the sample can no longer be used for DNA testing." *See Pompey*, No. S-1594-89 slip op. at 11.

[20] Dr. Ballard did not inform this Court or the Ninth Circuit what he had previously testified to in *Pompey*-that DNA testing cannot be performed on a sample following EDTA analysis. *Pompey*, No. S-1594-89, slip op. at 11.

telephonic hearing was continued to November 22, 2004 in order to allow the parties to further consult with their respective experts. On November 24, 2004, based on the proposed protocols, the Court filed a Protocol for DNA Testing of the Main Stain Fabric Cut-Out and Control. Steven Myers, Respondent's expert, and Marc Taylor, Petitioner's expert, performed the DNA testing.

From the results of that testing, Petitioner cannot be excluded as a contributor of the DNA extracted from the subject cut-out[21] while Peggy Ryen, Jessica Ryen, Josh Ryen, Doug Ryen, and Chris Hughes are each eliminated as a possible contributor of the interpreted profile. (04-CV-656, Doc. No. 305, Physical Evidence Examination Report and Report of Monitoring of DNA testing filed 12/23/04.)

C. The EDTA Test Results Do Not Support Petitioner's Theory of Tampering

1. Summary of the EDTA Test Results

On September 13, 2004, Cellmark performed extraction procedures on the T-shirt in accordance with the Court's September 7, 2004 order. The extracts were prepared in PBS buffer from a stained area of the T-shirt and from five control areas of the T-shirt that did not appear to be stained. (04-CV-656, Doc. No. 244, Report at 1.) A Control T-shirt

---

[21] The subject stain revealed a partial profile with interpretable results at four STR loci and amelogenin. (*See* 04-CV-656, Doc. No. 305, Physical Evidence Examination Report filed 12/23/04.)

was prepared in compliance with the Court's order. *(Id.)* From that Control T-shirt, extracts were prepared using a human blood stain containing EDTA, a human blood stain without EDTA, and an area that was not stained with human blood. *(Id.)* A PBS buffer reagent blank control that contained no EDTA was also prepared. In total, there were ten extracts. The extracts were divided, the specimens coded to conceal their contents and sent to the experts.

Dr. Ballard's results were as follows:

*938

Specimen No.	Specimen Contents Prepared from:	Approximate Amount of EDTA (*in nanograms*) on the Original Cloth Cutting[22]
F04156801.2	Stained area of T-shirt	110
F04156802.2	Control 1 of T-shirt	220
F04156803.2	Control 2 of T-shirt	360
F04156804.2	Control 3 of T-shirt	160
F04156805.2	Control 4 of T-shirt	110
F04156806.2	Control 5 of T-shirt	16
F04156807.2	Stain made from unpreserved blood on the Control T-shirt	7
F04156808.2	Stain made from blood preserved in a purple-topped tube on the Control T-shirt[23]	1100
F04156809.2	Unstained area from the Control T-shirt	6
F04156810.2	PBS Buffer Regent Blank Control	None detected

[22] Dr. Ballard estimated this total using the levels of EDTA he found in 200 micro liters of fluid to calculate the amount in the entire 6000 microliter sample prepared by Cellmark from each cloth cutting.

[23] This blood contained the standard concentration of EDTA found in a purple-topped tube: 1300 ng/L.

(04-CV-656, Doc. No. 22, Dr. Ballard's Test Results at 2.)

Dr. Suizdak also conducted EDTA testing on the ten specimens. Dr. Suizdak was without the benefit of Dr. Ballard's method for EDTA testing, as Dr. Ballard requested that his EDTA testing methodology be sealed.[24] On October 27, 2004, ***939** after he had completed his EDTA testing and submitted his measurements to the Court, Dr. Suizdak retracted his report based on EDTA contamination. (04-CV-656, Doc. No. 322, Ltr. from Dr. Gary Suizdak to Court filed under seal on October 27, 2004). Dr. Suizdak had found significant levels, 313 nanograms, of EDTA in the PBS buffer reagent blank control sample where zero EDTA was the known control. PBS buffer reagent contains no EDTA. If the test had been properly carried out, the PBS buffer reagent blank control sample should have been found to contain zero nanograms of EDTA. According to both Dr. Suizdak and Respondent's expert Terry D. Lee, Ph.D., the presence of EDTA in the control sample indicates that Dr. Suizdak's samples were most likely contaminated by EDTA present in his lab prior to his

---

[24] Although Dr. Suizdak, an Associate Professor and Senior Director of the Mass Spectrometry Lab at the Scripps Research Institute (04-CV-656, Doc. No. 204), was qualified in mass spectrometry, he had never done EDTA testing and analysis and agreed to participate based on the goal of publication. (8/27/04 HRT at 22, ll. 203; 23, ll. 6-8.) One problem encountered in this case was while many labs like the Scripps Research Institute possess the equipment for the test, there are no other scientists that regularly perform this type of testing.

testing. (Resp't Analysis of EDTA Test Results filed Oct. 29, 2004, Lee Decl. ¶ 6.) As Dr. Lee explained, "once a sample is contaminated, there is no way to go back and obtain an accurate result." *(Id.)* Because, in the absence of valid control specimens, the Court cannot rely on Dr. Suizdak's results, it will focus its analysis on the results of Petitioner's chosen expert, Dr. Ballard.

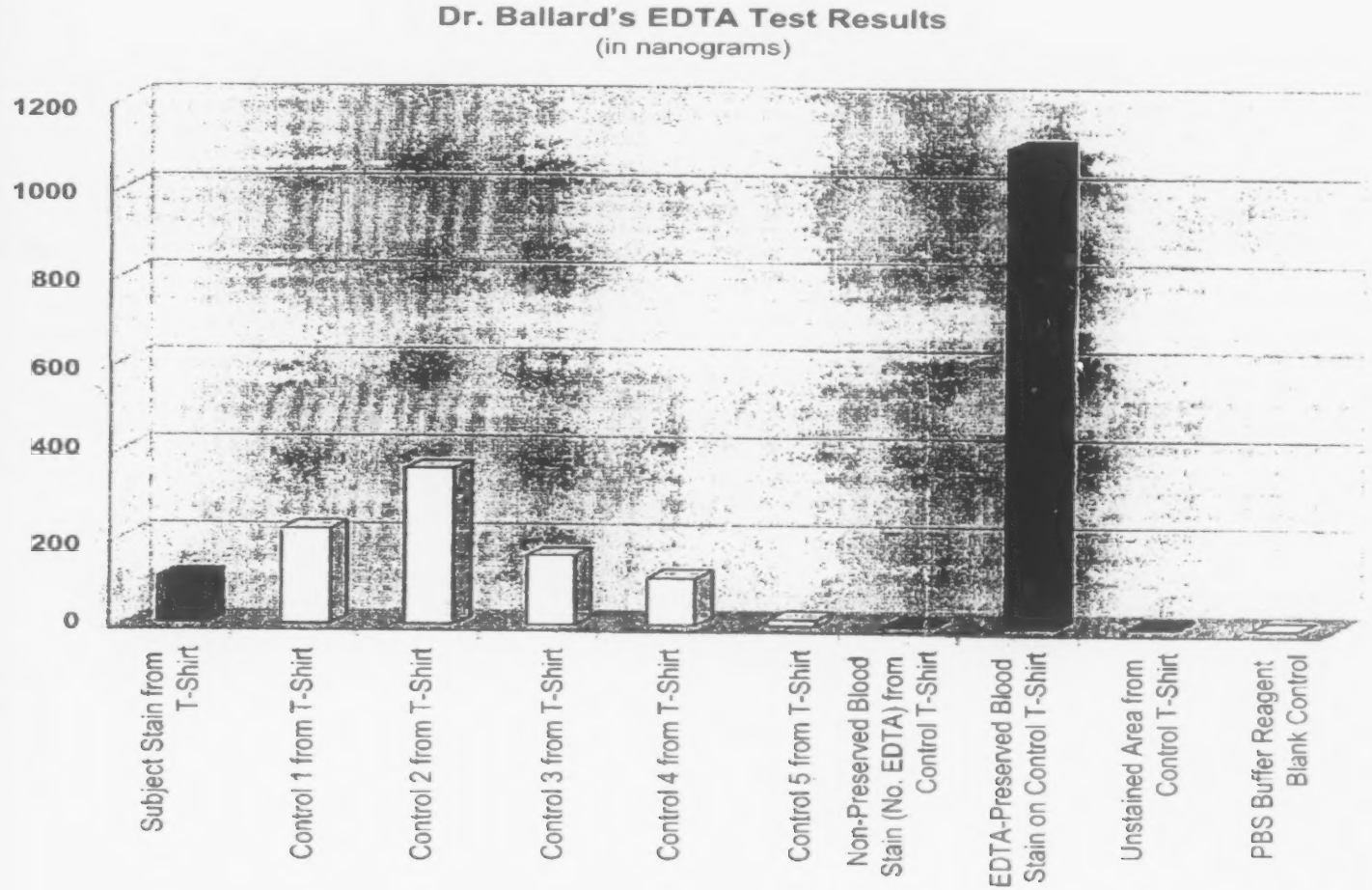
2. Analysis of EDTA Testing Results

Petitioner's post-conviction DNA expert identified the area in between 6J and 6K to have Petitioner as the majority contributor to those stains. This stain area ("subject stain") was tested by Dr. Ballard, along with five control areas around the subject stain. The testing conducted by Petitioner's expert, Dr. Ballard, is inconsistent with Petitioner's theory of tampering. If Petitioner's theory were correct, there would be spiked levels of EDTA in the subject stain on the shirt relative to the levels of EDTA found in the background material. Dr. Ballard's testing revealed the opposite: that the subject stain contains a level of EDTA (1) lower than most of the controls on the T-shirt, and (2) dramatically lower than the level of EDTA expected in a tampering scenario involving blood from a purple-topped tube.

According to Dr. Ballard, approximately 110 nanograms of EDTA were present in the subject blood stain. This amount was the second lowest for all of the samples taken from the T-shirt. For the controls, the average amount of EDTA found was 173 nanograms, with a range from 16 to 360 nanograms. The EDTA in the subject blood stain is

below the average for all five control areas on the T-shirt. This similarity between the level of EDTA found in the background and the level found in the subject stain does not support Petitioner's theory that the blood was planted. As Petitioner represented to the Ninth Circuit, "[i]f the blood was planted ... it will reflect a high level of EDTA." *Cooper*, 358 F.3d at 1124. But the flip side of that coin, as observed by Judges Silverman and Rawlinson in their concurrence, is that "if the blood is not contaminated by EDTA, the shirt conclusively proves [Cooper's] guilt." Dr. Ballard's results place Petitioner squarely within that second scenario. The EDTA level in the subject stain is not elevated, but is instead lower than that of most of the control areas. As a result, the test refutes Petitioner's tampering theory.

The results from the subject stain dramatically differ from the results from the Control T-shirt, on which blood was "planted" from a purple-topped tube. On the Control T-shirt, blood from a purple-topped tube containing EDTA as a preservative was "planted" in a stain similar in size to the subject stain. In that sample, Dr. Ballard found 1100 nanograms of ***940** EDTA, as expected. The "planted" blood on the control T-shirt reflects an EDTA level *ten times as great* as the level of EDTA detected in the subject stain (110 ng). If, as Petitioner contends, Petitioner's blood had indeed been placed on the T-shirt unnaturally, there should be a level of EDTA similar to-not dwarfed by-that found in the "planted" blood on the Control T-shirt.


Dr. Ballard's EDTA Test Results
(in nanograms)
1200
1000
800
600
400
200
0
Subject Stain from T-Shirt
Control 1 from T-Shirt
Control 2 from T-Shirt
Control 3 from T-Shirt
Control 4 from T-Shirt
Control 5 from T-Shirt
Non-Preserved Blood Stain (No. EDTA) from Control T-Shirt
EDTA-Preserved Blood Stain on Control T-Shirt
Unstained Area from Control T-Shirt
PBS Buffer Reagent Blank Control

The controls built into this testing process confirm Dr. Ballard's results. The PBS buffer reagent blank control contains no EDTA, and Dr. Ballard found none. (Resp't Analysis of EDTA Test Results filed Oct. 29, 2004, Lee Decl.¶ 3.) The specimens from the unstained area of the Control T-shirt, as well as the area stained with blood without EDTA, had minuscule levels of EDTA-6 and 7 nanograms, respectively. The specimen created from the blood stain with EDTA had 1100 nanograms, which represents an 84% recovery ***941** of the expected amount of EDTA in that sample. *(Id.)* These controls confirm that the levels of EDTA in the T-shirt were accurately measured.

From the test data, the Court concludes that the level of EDTA in the subject stain is 110 nanograms. Comparing the EDTA level of the subject stain to that for the control specimens, the Court concludes there is no reliable evidence of tampering. Similarly, when one compares the EDTA level in the subject stain to the high level present in the preserved blood "planted" on the Control T-shirt, 1100 ng, tampering becomes even less probable. In short, 110 ng of EDTA in the subject stain is not significant to show tampering.

Further testing is unnecessary given Petitioner's inability to show from these results the support for his tampering theory. Accordingly, the Court finds Petitioner's theory of tampering to be without merit.

D. EDTA Testing Falls Short of the Standards for Reliability Set by Daubert and the Federal Rules of Evidence

Although the absence of elevated levels of EDTA does not support Petitioner's theory of evidence tampering, the Court additionally concludes that EDTA testing lacks sufficient indicia of reliability to be admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). When EDTA testing was presented as an option to the en banc Ninth Circuit on the eve of execution, it was promoted as a basic, reliable test that could be easily administered to establish Petitioner's culpability in the murders "once and for all." *Cooper*, 358 F.3d at 1124. These representations regarding the simplicity of EDTA testing in the forensic context were misleading.

Petitioner admits that EDTA testing has only been offered for admission in two cases: *People v. Orenthal J. Simpson*, and *State of New Jersey v. Josh Pompey*, No. S-1594-89 (N.J.Super. April 10, 1997). In *Pompey*, the EDTA test results were excluded by the court after scathing criticism of Dr. Ballard's credibility and scientific methodology: "[Dr.] Ballard skewed the presentation of his data, obscured the significance of his findings and changed his hypothesis to suit defendant's tampering theory[,]" rendering "his ultimate conclusions worthless." *Id.* slip op. at 29. In the O.J. Simpson case, neither side raised a scientific challenge for strategic purposes, although its admissibility under the more lenient state-court *Kelly/Frye* standard was in question. *See* Henry C. Lee, Ph.D. & Frank

Tirnady, *Blood Evidence, How DNA is Revolutionizing the Way We Solve Crimes* 279-80 (2003)[*Blood Evidence*] (Suppl. Ex. to Resp't's *Daubert* Brief, Doc. No. 375 filed April 18, 2005.). While the extraction and measurement of EDTA in a sample may theoretically be accomplished, the ubiquity of EDTA in the environment prevents any meaningful interpretation of the significance of an "elevated" level of EDTA within a forensic sample. This shortcoming is underscored by the lack of acceptance of EDTA forensic testing in the scientific community. Petitioner concedes that there has been no peer review or publication on the subject of EDTA testing to prove tampering in the scientific community. (04-CV-656, Doc. No. 51, Ballard Decl. ¶ 8.) Lacking any evidence to show that EDTA testing is a reliable means of determining whether a blood sample has been planted, the Court concludes that Petitioner's EDTA evidence fails the *Daubert* test. *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786.

*942

1. *Daubert* and the Federal Rules of Evidence Control the Admissibility of Expert Testimony

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), a case originating from this district, the United States Supreme Court held that Federal Rule of Evidence 702 commands the primary focus for courts evaluating the admissibility of expert testimony. Rule 702 provides: "[i]f scientific, technical, or other specialized knowledge will assist

the trier of fact to understand the evidence or to determine a fact in issue," an expert "may testify thereto." Fed.R.Evid. 702. "Expert testimony is admissible pursuant to Rule 702 if it is both relevant and reliable." *Elsayed Mukhtar v. California State University, Hayward*, 299 F.3d 1053, 1063(9th Cir.2002) (citing *Daubert*, 509 U.S. at 589, 113 S.Ct. 2786).

[19] The trial court acts as a "gatekeeper" to exclude expert testimony that does not meet the relevancy and reliability threshold requirements. *Elsayed Mukhtar*, 299 F.3d at 1063. "A trial court not only has broad latitude in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability." *Id.* at 1064(citations omitted); see also *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir.2004) ("[F]ar from requiring trial judges to mechanically apply the Daubert factors ... *Kumho Tire* heavily emphasizes that judges are entitled to broad discretion when discharging their gatekeeping function.") (quoting *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir.2000)). "It is the proponent of the expert who has the burden of proving admissibility." *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir.1996); *see Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316 (9th Cir.1995) ("Daubert II") ("[T]he party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology.").

As to the first prong of *Daubert*, relevance means that the evidence will assist the trier of fact to understand or determine a fact in issue. *Daubert*, 509 U.S. at 591-92, 113 S.Ct. 2786. The evidence must logically advance a material aspect of the party's case. *Daubert II*, 43 F.3d at 1315. "Encompassed in the determination of whether expert testimony is relevant is whether it is helpful to the jury, which is the 'central concern' of Rule 702." *Elsayed Mukhtar*, 299 F.3d at 1063 n. 7 (citation omitted). "*Daubert* [also] adds that the gatekeeping inquiry must be 'tied to the facts' of a particular 'case.'" *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (quoting *Daubert*, 509 U.S. at 591, 113 S.Ct. 2786).

The proposed expert testimony must satisfy a second hurdle, reliability, before it can be admitted. "The trial court must [also] act as a 'gatekeeper' to exclude 'junk science' that does not meet Rule 702's reliability standards by making a preliminary determination that the expert's testimony is reliable." *Elsayed Mukhtar*, 299 F.3d at 1063. "Rule 702 demands that expert testimony relate to scientific, technical or other specialized knowledge, which does not include unsubstantiated speculation and subjective beliefs." *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir.1997) (citing *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786).

Daubert provides the following non-exclusive list of factors to guide the assessment ***943** of the reliability of scientific evidence: (1) whether a scientific theory or technique can be (and has been)

tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (4) whether the technique is generally accepted. *Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786; *see Kumho Tire*, 526 U.S. at 151, 119 S.Ct. 1167("[*Daubert*] made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged.")

The Court's analysis of the relevance and reliability of expert testimony is "vital to ensure accurate and unbiased decision-making by the trier of fact." *Elsayed Mukhtar*, 299 F.3d at 1063. The goal is to "make certain that an expert ... employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* (quoting *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167.). If evidence lacks either reliability or relevance, it must be excluded.

2. Dr. Ballard's EDTA Testing Does Not Satisfy the Criteria for Reliability Set Forth in Daubert

Petitioner has argued repeatedly that this Court's only inquiry under *Daubert* is whether Dr. Ballard's EDTA testing will "assist" the trier of fact in resolving the ultimate issue-the likelihood of tampering. (*See, e.g.*, 4/22/05 HRT 50, ll. 12-16.) This grossly understates the level of scrutiny required by *Daubert*, which compels the Court to look beyond

whether expert testimony can merely "assist" the trier of fact, and confirm that the expert uses a reliable and scientifically valid method. It is that second inquiry, into reliability, that is dispositive in this case. Petitioner's proposed EDTA testing evidence unquestionably falls short of the standards set by *Daubert* for reliability.

a. With Only One Exception, No Court has Admitted Either the Testimony of Dr. Ballard or his EDTA Test Results

This Court is not alone in its dubious view of EDTA forensic testing. To date, the sole case in which EDTA test results[25] have been admitted is *People v. Orenthal James Simpson*.[26] (4/22/05 at 50, ll. 17-19.) There, Dr. Ballard did not participate directly in the EDTA testing. (4/2/04 HRT 92 ll. 20-22.) In the only case where Dr. Ballard's testing results were offered, *New Jersey v. Josh Pompey*, the New Jersey Superior Court soundly rejected both the credibility of Dr. Ballard and the reliability of EDTA testing in ruling that EDTA evidence was not admissible. *Pompey*, No. S-1594-89.

---

[25] The court notes that Petitioner concedes that no court has admitted Oxalic or Citric Acid testing into evidence. (*See* Pet'r's Ex Parte Request for Further Testing and Budget filed under seal Jan. 7, 2005.)

[26] Petitioner also points to the Office of the Inspector General ("OIG") report as "validation" of the forensic validity of EDTA testing. The Court has reviewed the report of the OIG, a non-scientific investigatory entity within the Department of Justice, and has concluded that it provides no such endorsement of the scientific reliability of Dr. Ballard and EDTA testing.

In the O.J. Simpson case, the FBI attempted to create a test that could differentiate preserved from fresh blood by analyzing EDTA content, but its witness was called by the defense at trial.[27] *Blood* ***944** *Evidence*, at 278-79. In contrast to this case, there was no objection raised to the admissibility of the EDTA test although the prosecution had been concerned that it was inadmissible under the state-court *Kelly/Frye* standard. *Id.* at 279-80.[28] No review of the scientific methodology of EDTA testing was conducted by the parties or the Court in the O.J. case: "[T]he testing protocol ... was never called into question. It was simply a matter of interpretation."[29]

---

[27] The FBI no longer conducts EDTA testing.

[28] The state-court *Kelly/Frye* standard, 17 Cal.3d 24, 30, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976); *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), is less rigorous than *Daubert*. Under *Kelly/ Frye*, "the proponent of evidence derived from a new scientific methodology must satisfy three prongs, by showing, first, that the reliability of the new technique has gained general acceptance in the relevant scientific community, second, that the expert testifying to that effect is qualified to do so, and, third, that correct scientific procedures were used in the particular case." *People v. Roybal*, 19 Cal.4th 481, 505, 79 Cal.Rptr.2d 487, 966 P.2d 521 (1998).

[29] That forensic EDTA testing was engendered and cultivated solely within the context of litigation discounts the reliability of the technology under Daubert. The Advisory Notes to Federal Rule of Evidence 702 specify that a court may also consider "whether experts are 'proposing to testify about matters growing naturally and directly out of their research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying.'" Fed.R.Evid. 702 advisory committee's notes (amended 2000) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir.1995)). In light of this genesis for

Id. at 280. "[T]he results of the tests permitted both sides to claim a measure of victory." *Id.*

In the only other case where the admissibility of EDTA test results has been considered, *New Jersey v. Pompey*, Dr. Ballard conducted the testing and claimed to have found "forensically significant" amounts of EDTA in several blood stains. However, the Pompey court strongly rebuked Dr. Ballard for failing to "provide[ ] a simple, scientific context within which to measure and compare his findings" leaving the court "with the impression that Ballard omitted the information to simultaneously maintain, magnify and disguise the import of his allegedly significant findings of EDTA."[30] Pompey, No. S-1594-89, slip op. at 14. The *Pompey* court accused Dr. Ballard of "selectively adher[ing] to a scientific method" and that he "had an agenda to effectuate outcomes that support the defendant's tampering theory." *Pompey*, No. S-1594-89, *Id.* slip op. at 21, 19.

For example, in *Pompey*, one of the stains in which Dr. Ballard found an "elevated" EDTA level

---

forensic EDTA testing, the Court concludes this factor also weighs heavily against Petitioner.

[30] The *Pompey* court was troubled by Dr. Ballard's failure to explain the units for his various calculations. In this case, Dr. Ballard provided certain standard "concentrations" for EDTA in blood at the tutorial. In the report of his results, an "EDTA concentration" heading appears without any further explanation. Only after noticing an important disparity in the units presented at the tutorial (ng/L) and the units employed in Dr. Ballard's results (ng/mL) was the Court able to discern that the "EDTA concentration" referenced in his results denoted the concentration of EDTA in the buffer fluid, not the concentration of EDTA in blood.

consisted solely of the victim's blood, which had never been preserved in a purple-topped tube. *Pompey*, No. S-1594-89, slip op. at 7. Similarly, Dr. Ballard was criticized for testing two stains together, neither of which had been linked to the alleged perpetrator, and pronouncing the aggregated EDTA number as forensically significant. *Pompey*, No. S-1594-89, slip op. at 9-10. Dr. Ballard ***945** did not normalize the aggregated numbers to account for the multiple stains. *Pompey*, No. S-1594-89, slip op. at 9-10.

Calling Dr. Ballard's analytical methods "haphazard and unreliable," the *Pompey* court stated the following conclusions:

> In sum, he used valid science (gas chromatography/ mass spectrometry) to obtain a product, glibly and unscientifically dismissed EDTA from sources other than the purple-topped tubes, and took a gargantuan leap to a conclusion that is unsupported by science, facts in the record or even common sense.
>
> ...
>
> Ballard skewed the presentation of his data, obscured the significance of his findings and changed his hypotheses to suit defendant's tampering theory. Ballard did not demonstrate that his conclusions were predicated on a reliable foundation. Rather, his constant equivocations discredited his method of reasoning and thus rendered his ultimate conclusions worthless.

Pompey, No. S-1594-89, slip op. at 21, 29.

The *Pompey* court's sharp disagreement with Dr. Ballard's methodology and conclusions strengthen this Court's own doubts about the admissibility of EDTA testing in this case. The Court's diligent efforts to wade through this alleged "science" of EDTA has elicited many of the same concerns as those expressed by the court in *Pompey*.

A scientific test is not automatically admissible. For example, a polygraph test can reliably measure a person's heart rate, blood pressure, and breathing. However, a polygraph test is inadmissible to show that person's veracity. *See, e.g., United States v. Ramirez-Robles*, 386 F.3d 1234, 1247(9th Cir.2004) (affirming district court exclusion of polygraph testimony, citing its "highly influential nature"); *United States v. Benavidez-Benavidez*, 217 F.3d 720, 725 (9th Cir.2000) (affirming district court's decision to exclude potentially exculpatory polygraph results); *United States v. Cordoba*, 104 F.3d 225, 227-28 (9th Cir.1997) (noting the "inherent problematic nature" of polygraphs).

EDTA testing presents an equally "inherent problematic nature." *Cordoba*, 104 F.3d at 227-28. Like polygraph testing, the error rate of EDTA testing cannot be determined. The widespread presence of EDTA in the environment can never be ruled out as the source of any EDTA detected in the specimen. In addition, since the history of each specimen's exposure to environmental EDTA is unknown, there are no established standards against which a test result can be compared. As a

result, the factfinder can never reliably conclude from the presence of EDTA in a stain that tampering occurred. There are no industry standards that bind the testing scientist to a certain test protocol. If anything, this problem is more pronounced in the EDTA testing field, where Dr. Ballard appears to be almost the only individual who performs this type of test.[31]

***946** The Court concludes that the measurement of EDTA cannot be reliably used to decide the ultimate issue at hand, the probability of tampering. Under the Advisory Committee notes to the Federal Rules of Evidence, a court may weigh this disconnect-"whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion"-against admissibility. Fed.R.Evid. 702 advisory committee's notes (amended 2000) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) for the proposition "that in some cases a trial court 'may conclude that there is simply too great an analytical gap between the data and the opinion proffered'").

---

[31] Initially, the Court declined to fund Dr. Ballard as an expert. (04-CV-656, Doc. Nos. 81, 97, Court's Order filed 6/10/04 and 6/17/04.) In declining to fund Dr. Ballard as an expert, the Court requested that Petitioner provide the Court with "an independent expert and laboratory not affiliated with Dr. Ballard or law enforcement that is qualified to perform the proposed EDTA testing." (04-CV-656, Doc. No. 81, Court Order filed 6/10/04.) In response, the only name provided by Petitioner was Michael Vickery at NMS where Ballard works, a scientist with a community college degree. (04-CV-656, Doc. No. 208, Court's Order filed Aug. 27, 2004 at 4.)

b. The Application of EDTA Testing to the Forensic Context is Not Scientifically Accepted and Has Not Been Subjected to Either Peer Review or Publication

Petitioner cites only one article from 1997 that discusses EDTA measurement in the tampering context. This article does not "subject" Dr. Ballard and his methodology to meaningful "peer review." Publication and peer review are the process by which new scientific methodology is rigorously scrutinized and verified. By referencing peer review as a factor to be considered under *Daubert*, the Supreme Court indicated that only methods tested and subsequently accepted by the scientific community are methods on which the courts should rely. Indeed, it is illogical that a court would accept a new scientific methodology before it had been adequately reviewed and accepted by the scientific community.

Petitioner attempts to explain the dearth of publication and peer review by claiming that this technology is "new," serves no significant commercial purpose, and is of limited interest to the general population. The Court is not persuaded that these explanations allow the Court to overlook the fact that Dr. Ballard's methodology has undergone no scientific scrutiny. Dr. Ballard's use of EDTA testing is not new; EDTA testing was utilized in the O.J. Simpson trial a decade ago. It defies our modern experience to term science from ten years ago as "new." The Court finds it telling that, since 1997, Petitioner has been unable to identify any publication or peer review of EDTA testing, and only identifies Dr. Ballard's own abstracts. This void is

especially conspicuous given the extreme notoriety of the O.J. Simpson case: if any case were to catapult a new technology to the forefront of forensic science, it would have been one of national recognition like the O.J. Simpson trial.

Despite numerous opportunities, Petitioner was unable to find any qualified expert or lab that would perform EDTA testing other than Dr. Ballard. That no lab in the country and no scientist other than Dr. Ballard has ventured into this allegedly "new" science of EDTA testing since that time speaks volumes about its reliability. As this Court previously explained, "[h]aving Dr. Ballard as the only scientist willing to perform the proposed EDTA testing indicates that not only has his methodology not been tested or subject to peer review, it is an indication that his methodology is not generally accepted and not reliable under *Daubert*." (04-CV-656, Doc. No. 97, Court Order filed June 17, 2004 at 16.)

c. There are No Standard EDTA Levels Against Which Test Results Can Be Compared, Permitting Significant Manipulation of the Results and Preventing Definitive Conclusions

Even if the amount of EDTA in a forensic sample can be properly measured,[32] ***947** several variables

---

[32] It is unclear to the Court whether this is even the case, given the inability of Dr. Suizdak, an accomplished expert in mass spectrometry from Scripps Institute, to arrive at accurate results.

prevent the reliable interpretation of that number to accurately answer whether tampering with that sample has occurred. EDTA is ubiquitous in the environment. (04-CV-656, Doc. No. 51, Ballard Decl. ¶ 3e.) It is a simple chemical compound with numerous applications. EDTA is used in food products to prevent rancidity; cleaning agents such as laundry and dish detergent, and bathroom and kitchen tile cleaners; and personal care products such as cosmetics, hand lotions, deodorant, and soap in concentrations up to 20% (or 200,000 ng/# CE# L). *Pompey*, No. S-1594-89, slip op. at 4, 29; (04-CV-656, Doc. No. 23, Ex. 3, Phillips Decl. ¶ 9; Doc. No. 51, Ballard Decl.¶ 3e; 4/2/04 HRT 54, ll. 10-14.) By comparison, EDTA is used as a blood preservative in the purple-topped tubes in a concentration of .13% (or 1,300 ng/# CE# L). (04-CV-656, Doc. No. 23, Ex. 3, Phillips Decl. ¶ 5.) The court in *Pompey* likened the abundance of EDTA in our environment "to saying that we are like fish swimming in an ocean of EDTA." *Pompey*, No. S-1594-89, slip op. at 4-5.

The common presence of EDTA precludes the establishment of known, standard levels of EDTA against which a test measurement could reliably be compared. Since EDTA is commonly found in the environment, there is no scientifically valid method, even through the testing of controls, to ascertain whether the EDTA present in a stain resulted from benign environmental sources. (*See* 04-CV-656, Doc. No. 23, Ex. 3, Phillips Decl. ¶ 11.) According to Petitioner, EDTA may also have "migrated"[33] from one area of the background material to another,

[33] EDTA is readily soluble in water. (4/2/04 HRT 54: ll. 3-4.)

muddling further the interpretation of the EDTA levels. *(See* 04-CV-656, Doc. No. 51, Ballard Decl. 4("Can EDTA testing tell you how the EDTA got there? Of course not.").) In short, EDTA does not bear a signature that denotes its source. This is convenient. This uncertainty, however, precludes the reliable and consistent interpretation of EDTA test results, as is required for admission under *Daubert*.

Under the theory Petitioner presented to the Ninth Circuit, the absence of a spiked level of EDTA disproved tampering. Under a theory Petitioner now espouses, a low or constant level of EDTA does not foreclose the possibility of tampering. With a technology where results can be so easily manipulated, there are no definite and reliable conclusions. Moreover, EDTA testing may undermine the ability to perform further DNA testing. Dr. Ballard has previously testified that once EDTA is extracted from a sample, the sample can no longer be used for DNA testing.[34] *Pompey*, No. S-1594-89 slip op. at 11; (*see also* 04-CV-656, Doc. No. 23, Ex. 3, Phillips Decl. at ¶ 8.)

---

[34] Additional testing will not clarify any interpretation of the EDTA level in the subject stain. Given the presence of EDTA in products like deodorant, hand lotion, and laundry detergent, a constant level of EDTA in the background material cannot be expected. Different areas of a T-shirt could reflect different levels of EDTA. (4/2/04 HRT 67, ll. 4-13.) According to Petitioner's theory, those variant levels of EDTA could also "migrate" to different areas of the T-shirt. Thus, there is no certainty about which EDTA came from which source, and where that EDTA has since "migrated." Because of the widespread presence of EDTA in the environment, EDTA levels cannot be reliably interpreted. There is simply an unacceptable risk of error.

*948 The Court concludes that EDTA testing does not satisfy *Daubert* standards. Because there are so many variables that potentially skew the EDTA test administration and the interpretation of the results, a factfinder is unable to draw any reliable conclusions that assist its resolution of whether tampering occurred. The Advisory Committee notes to the Federal Rules of Evidence instruct the Court to consider "whether the expert has adequately accounted for obvious alternate explanations." Fed.R.Evid. 702 advisory committee's notes (amended 2000). This factor is relevant here, where it is simply impossible for an expert to "adequately account" for the myriad "obvious alternate explanations" for the detection of elevated EDTA levels within a forensic sample. *Id.*

Contrary to how EDTA testing was portrayed to the Ninth Circuit, it is far from "definitive." *Cooper*, 358 F.3d at 1125. Instead, its admission here would require the Court to "glibly and unscientifically dismiss EDTA from sources other than the purple-topped tubes, and t[ake] a gargantuan leap to a conclusion that is unsupported by science, facts in the record, or even common sense." *Pompey*, No. S-2594-89, slip. op. at 21. The Court declines to do so as Petitioner's EDTA testing does not meet Daubert standards.

E. The Court's Conclusions as to the Reliability of EDTA Testing Do Not Affect Its Previous Finding That Dr. Ballard's Results Disprove Petitioner's Theory of Tampering

The Court's serious concerns about the reliability of EDTA testing do not negate the Court's conclusion that Dr. Ballard's test results do not support Petitioner's theory of tampering. In Petitioner's case, the level of EDTA found in the subject stain is so low (110 ng) that it cannot be considered significant to show tampering.[35]

Here, where the amount of EDTA detected in the controls, on average, exceeds the amount found in the subject stain, Petitioner's theory of tampering is without support. As Petitioner represented to the Ninth Circuit, "If the blood was planted, ... it will reflect a high level of EDTA." *Cooper*, 358 F.3d at 1125. With only a small amount of EDTA found in the subject stain compared to the control specimens and the "planted" blood on the Control T-shirt, the EDTA test results are not consistent with evidence of tampering.

---

[35] Were the results for the subject stain high relative to the control areas, the Court would have concerns under Daubert due to the widespread presence of background EDTA as a variable that may result in a false positive. In that scenario, the Court could not evaluate whether the elevated level of EDTA resulted from tampering or some benign factor.

F. The Court Denies The Request to Subject A-41 to Further Testing

The Court's grave reservations about the reliability of EDTA testing are more pronounced with Exhibit A-41, blood found on the wall of the victims' home.[36] The Court's *Daubert* ruling bars Petitioner's request for EDTA testing of A-41, but even were that not the case, the Court concludes that A-41 is not suitable for ***949** EDTA testing using the control method or any other method of testing.

The totality of the record supports the Court's conclusion that A-41 is not suitable for further scientific testing. Petitioner's expert, Dr. Blake and Steven Myers testified that there is no visible blood remaining on the paint chips comprising A-4. Additionally, the blood used for the nuclear DNA testing performed pursuant the Joint DNA Testing Agreement was found as a dried substance at the bottom of the container holding A-41. Petitioner's expert Dr. Edward Blake testified at the June 3, 2004, evidentiary hearing regarding A-41:

Dr. Blake: ... you open up the A-41 tin, and you look at it, and for all intents and purposes, there's no blood there. However, when you look at it with a stereo microscope, a little bit different story (sic). There is a very fine powder of blood that remains

---

[36] Petitioner's request to test A-41 was not included in its successive petition, filed on April 1, 2004. (04-CV-656, Doc. No. 1.)

> on the inside of the tin. And that's what was collected for PCR[37] analysis.

(*See* [04-CV-656, Doc. No. 116 at 7] Petr's Mem. of P & A. in Supp. of the July 12, 2004 Mot. for Reconsideration (quoting excerpts from 6/4/04 HRT).)

Dr. Blake's credible testimony is corroborated by Mr. Myers' testimony at an evidentiary hearing before Judge William H. Kennedy in the California Superior Court on June 24, 2003, regarding A-41 at the time of the 2001 post-conviction nuclear DNA testing. Mr. Myers testified that when he tested A-41 for nuclear DNA he used the remaining paint chip and some of the blood powder inside the tin containing the paint chip:

> Mr. Bernstein: With A-41A, you described that as the blood powder, plus inside the tin there was a little open tube with a hole at the bottom and a paint chip inside it?
>
> Mr. Myers: Correct.
>
> - - - - - -

---

[37] When testing for DNA, a small sample size can be overcome through polymerase chain reaction ("PCR"). Using PCR, minuscule amounts of DNA can be replicated and the sample size increased so that the amount of available DNA is sufficient for testing. PCR is limited in its application to DNA and cannot replicate or regenerate from a minute amount of blood powder the amount of EDTA (if any) present in the original sample. Given this critical limitation, even if any sparse remnants of fine, blood powder remaining in A-41 could be tested, it would be impossible for the factfinder to extrapolate from those results to determine whether the original drop was planted.

Mr. Bernstein: And you combined the chip with the powder?

Mr. Myers: Not all of the powder, because that tube with the hole in it actually-and I took a stereomicrograph of this-had some of the powder adhering to the outside of the tube. So I swabbed the inside of the tin and I took the paint chip, combined those into making my DNA extraction sample. But whatever might have been adhering to the outside of that tube when the tube was put back into the tin, it still exists.

Mr. Bernstein: So you extracted the chip and the powder together?

Mr. Myers: The chip and the powder that I swabbed from the inside of the tin; but, as I said, there's some powder that may still be present.

(*See* 04-CV-656, Doc. No. 28, NOL filed February 4, 2004 at 298-99.) The California Supreme Court has also noted that "[o]nly a minute amount of the blood remained after these tests." *Cooper*, 53 Cal.3d at 799, 281 Cal.Rptr. 90, 809 P.2d 865. This "minute amount" of blood has already been subjected to extraction for ***950** DNA testing, which may alter the sample such that the original EDTA level could not be accurately measured. (4/2/04 HRT 71-72.)

In addition, Dr. Blake's and Mr. Myers' credible testimony support the conclusion that A-41 is not able to be tested for EDTA using the control method. Both Dr. Ballard and Mr. LeBeau describe the control method as requiring control areas around the

blood sample to determine if there is a significant difference between the amounts of EDTA in the stain compared with areas immediately surrounding the stain. The post-conviction record demonstrates that the state of A-41 does not provide such controls. As a result, the Court concludes that A-41 is not able to be scientifically and reliably tested for the presence of EDTA. Indeed, the totality of the record before this Court supports the conclusion that A-41 is not suitable for further scientific testing. In addition, given the Court's Daubert concerns, the Court concludes that EDTA testing of A-41 is unlikely to be of interpretative value and is unwarranted destructive testing of the evidence.

IV. Actual Innocence

In the first claim of the successive petition, Petitioner alleges that his federal constitutional rights have been denied because he is innocent of all but the escape charge. However, the post-conviction DNA testing confirmed Petitioner's guilt. Petitioner's blood was found at the crime scene and on cigarette butts found inside the Ryen station wagon after the car was recovered in Long Beach.

A. DNA Evidence Establishes Petitioner's Guilt

Subsequent to the passage of California Penal Code section 1405, the California authorities agreed to have certain DNA testing performed in 2001. Petitioner had the assistance of two nationally recognized DNA experts, Dr. Edward Blake and Christopher Plourd. The parties entered into a Joint

Forensic DNA Testing Agreement that specified the items of evidence to be tested, how they were to be shipped and the method of DNA testing. *(See* Joint DNA Agreement dated May 10, 2001.)

Pursuant to the Joint DNA Agreement, the evidence to be tested was shipped to the DOJ DNA Laboratory in Berkeley from two locations: the San Diego Superior Court and the San Bernardino County Sheriff's Identification Division. (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. No. 33, Judge Kennedy Order dated May 10, 2001.) The items shipped from the custody of the San Diego Superior Court, Evidence Clerk, were: a hand-rolled cigarette butt recovered from the Ryen station wagon in Long Beach (Trial Exhibit 584A) (Laboratory item no. V-12); a hatchet (Trial Exhibit 42); the major portion of a T-shirt found near the Canyon Corral Bar (Trial Exhibit 169) (Laboratory Item CC); and a button found in the hideout house bedroom (Trial Exhibit 97). *(Id.)* The remaining items to be tested were shipped by the San Bernardino County Sheriff's Identification Division. Those items were: a manufactured cigarette butt (Laboratory item no. V-17), found in the Ryen station wagon in Long Beach; the cutout portion from the same T-shirt (Trial Exhibit 169), which remained in the custody of the San Bernardino County Sheriff's Identification Division following Petitioner's trial; hair recovered from the hands of the victims; the remains of bloodstain A-41 (the drop of blood found in the hallway outside the Ryen master ***951** bedroom); and the reference hair and blood samples from Petitioner and the victims. (Joint DNA Agreement dated May 10, 2001 at 2-5.)

The Agreement provided for STR Profiler Plus DNA testing to be performed by DOJ Berkeley on the specified items of evidence in two stages: "blind" STR Profiler Plus DNA testing was to be performed on specified pieces of crime scene evidence, followed by STR Profiler Plus DNA testing on the known exemplars from Petitioner and the victims. (*Id.* at 11.) The "blind" test results from the crime scene evidence would then be compared with the results obtained from the known reference samples from Petitioner and the victims. (*Id.* at 11-12.) STR DNA testing is a forensic DNA testing method that is generally accepted within the relevant scientific community for forensic testing of biological specimens. (*Id.* at 6.)

The results are summarized in the Physical Evidence Examination Report dated July 7, 2002, and in the Supplemental Report dated September 24, 2002. (DOJ Physical Evidence Exam Report dated July 2, 2002; Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) The DNA testing that was done provides the most probative evidence of the identity of the murderer. In his July 24, 2001 report, Petitioner's own DNA expert, Dr. Edward T. Blake, stated that the "most relevant biological evidence in this case is contained within the blood and cigarette butt evidence described above." (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. 24, Dr. Blake Letter dated July 24, 2001 at 4.) Dr. Blake had been one of the defense experts on Petitioner's defense team prior to trial, at trial and during the post-conviction DNA testing procedure.

The Supplemental Report concludes that the DNA testing provides strong evidence that Petitioner is the donor of the DNA extracted from: the drop of blood found in the hallway outside the Ryen master bedroom (A-41), saliva from the hand-rolled and manufactured cigarette butts found inside the abandoned Ryen station wagon, and blood smears on the T-shirt found near the Canyon Corral Bar. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) Petitioner's DNA profile is consistent with the DNA profiles obtained from each of those items of evidence. *(Id.)* The DNA profiles that do not match Petitioner are all consistent with the victims' DNA profiles. The testing did not reveal any unidentified DNA profiles. *(Id.)*

The STR Profiler Plus DNA result obtained from A-41, the bloodstain found on the hallway wall outside the Ryen master bedroom, has been determined to match Petitioner's DNA profile. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 1-2.) The probability of a random match is approximately 1 in 310 billion for African Americans, 1 in 270 billion for Caucasians, and 1 in 340 billion for Western Hispanics. *(Id.)* The evidentiary significance of this result is twofold. First, at trial Petitioner testified at length and he denied ever "approaching the Ryen house." *Cooper*, 53 Cal.3d at 802, 281 Cal.Rptr. 90, 809 P.2d 865. Second, the presence of Petitioner's blood inside the Ryen home confirms that Petitioner was inside the Ryen house, in the middle of the crime scene.

The STR Profiler Plus DNA also showed that Petitioner's DNA was found on two cigarettes butts

found in the Ryen station wagon. The probability estimates for the manufactured cigarette butt, item ***952** V-17, was 1 in 19 billion and for the hand rolled cigarette butt, item DOJ-5, was 1 in 110 million. (*Id.* at 2.) The STR Profiler Plus DNA results from both cigarette butts that were recovered from the Ryen station wagon in Long Beach also has particular significance when considered with the other evidence introduced at trial. The DNA results from the cigarette butts establish that Petitioner took the Ryen station wagon to make his escape after committing the murders. There was a massive manhunt for Petitioner after he escaped from Chino, and there was evidence at trial that shortly prior to committing the murders Petitioner had made telephone calls from the hideout house in an unsuccessful attempt to get help so he could escape from the Chino Hills. *Cooper*, 53 Cal.3d at 796, 281 Cal.Rptr. 90, 809 P.2d 865. The DNA results obtained from the two cigarette butts fortify the conclusion stated by the California Supreme Court that Petitioner "had an obvious motive both for stealing the Ryen car-to get transportation away from the area-and for killing the family-to facilitate the theft and gain time to perfect his escape." *Id.* at 771, 832, 281 Cal.Rptr. 90, 809 P.2d 865.

Similarly, the STR Profiler Plus DNA results obtained from the T-shirt found by the roadway leading from the Ryen house to the nearest freeway link Petitioner to the crime. Blood on the cutout portion of the T-shirt (DOJ item CC-1B) matches Doug Ryen's blood. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 3.) In addition, several blood smears/spatters found during

the course of the STR Profiler Plus testing match Petitioner's DNA profile. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 3.) These blood smears/spatters, from which DNA profiles matching Petitioner were obtained, were found on Trial Exhibit 169 (Laboratory Item CC), the portion of the T-shirt which remained in the custody of the San Diego Superior Court Evidence Clerk, since the time of Petitioner's trial in 1984 and 1985 prior to the post-conviction DNA testing. (92-CV-427, NOL filed Jan. 20, 2004, Ex. 6, Judge Kennedy's order dated July 2, 2003 at 10.)

The state court conducted a post-conviction evidentiary hearing in 2003 to address, among other items, Petitioner's claim of evidence tampering. The Honorable William H. Kennedy concluded that there was no merit to Petitioner's claim of evidence tampering. (92-CV-427, NOL filed Jan. 20, 2004, Ex. 6, Judge Kennedy's order dated July 2, 2003 at 10.)

The T-shirt was found by the side of a road which connected the Ryen home with a freeway system that eventually leads to Long Beach, where the Ryen station wagon was found abandoned. The STR Profiler Plus DNA results from this T-shirt establish the presence of Petitioner's and victim Doug Ryen's blood on the same article of clothing. The DNA results provide additional evidence establishing Petitioner's guilt.

In sum, this Court concludes that the DNA test results obtained from the evidence presented at trial establish Petitioner's guilt. *(See* Supplemental DOJ

Physical Evidence Exam Report dated Sept. 24, 2002 at 3.)

B. Petitioner's Challenge to the DNA Evidence is Without Merit

Petitioner attempts to undermine the post-conviction DNA testing results by claiming that Criminalist Dan Gregonis might have contaminated or tampered with the evidence. However, his unsupported ***953** assertion ignores the consistent DNA test results which were obtained from the hand-rolled cigarette butt found in the Ryen vehicle after its recovery in Long Beach (DOJ-5, crime lab item V-12) and from blood smears/spatters on the T-shirt (DOJ-6) found near the roadway linking the Ryen home to the nearest freeway. The DNA profiles obtained from these items (DOJ-5 and DOJ-6) match the corresponding portion of the full DNA profile obtained from A-41-major donor and Petitioner's DNA profile. All these items were in the custody of the San Diego Superior Court Exhibit Clerk from 1984 until 2001, when they were shipped directly to the DOJ Berkeley DNA Laboratory for analysis. Gregonis has had no contact since the time of trial with either the hand-rolled cigarette butt (DOJ-5, crime lab item V-12) or the portion of the T-shirt on which the blood smears matching Petitioner's DNA profile were obtained (Trial Ex. 169). Consistent DNA test results confirming Petitioner's guilt have been obtained from evidence Gregonis had no contact with in 1999, and as to which he has had no contact since the time of Petitioner's trial. The items, which have remained in the custody of the San Diego Superior Court Evidence Clerk, operate as an

independent control on the DNA results obtained from the items that were in the custody of the Sheriff's Department.

Criminalist Gregonis and others testified at the post-conviction evidentiary hearing held before Judge Kennedy of the California Superior Court on June 23, 2003.(92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Exs. 20, 23, Decl. and Mot. Test. of Dan Gregonis at 97, 99-107, 110-17, 122-23, 128-29, 131-33.) Judge Kennedy found at the conclusion of the hearing that Petitioner "has not made any showing that law enforcement personnel tampered with or contaminated any evidence in this case." (92-CV-427, NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order dated July 2, 2003 at 10.)

After reviewing the transcripts of Judge Kennedy's evidentiary hearing, his findings and conclusions, the parties' submissions and all relevant evidence, the Court finds no merit to Petitioner's challenge of the veracity of the DNA evidence. Moreover, EDTA testing ordered by this Court fails to show Petitioner's blood was planted on the T-shirt.

Accordingly, the Court **DENIES** his claim of actual innocence. Petitioner is unable to meet his burden of establishing by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2). Even if he met the burden of 28 U.S.C. § 2244(b)(2), Petitioner's claim is denied on the merits pursuant to 28 U.S.C. § 2254. Alternatively,

Petitioner failed to show that in light of all the evidence, including new evidence, it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 327-28, 115 S.Ct. 851. Further, the Court concludes that Petitioner has not met the stringent burden of *Herrera*, which requires an "extraordinarily high" showing of "a truly persuasive demonstration of 'actual innocence.'" As detailed below, Petitioner fails his burden and the Court **DENIES** these claims under 28 U.S.C. 2244(b)(2), and alternatively, under *Schlup* and under *Herrera*, and on the merits pursuant to 28 U.S.C. § 2254(d).

As a result, the Court concludes that all claims in this successive petition are properly **DENIED** either under AEDPA, which requires among other things, a "factual***954** claim [ ] not discoverable through the exercise of due diligence" that establishes by "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," or under *Schlup*, which requires a showing that it "in light of all the evidence, including new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."

C. Prior Court Rulings and Findings Document Overwhelming Evidence of Guilt

1. Trial Court Rulings and Findings

The trial judge, Richard Garner, made an independent determination of Petitioner's guilt at

sentencing. (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. 7, Transcripts of Judge Garner's rulings at sentencing, May 15, 1985 at 8144-50.) Judge Garner stated on the record:

> The Court has examined and reviewed all of the evidence that was presented to the jury, the trier of the fact, and in making this determination, the Court has also examined all of the exhibits admitted into evidence and studied the daily transcripts on both phases.
>
> The law, from all of the evidence admitted at the guilt phase, the Court is satisfied beyond a reasonable doubt, all reasonable doubt that the defendant, Kevin Cooper, is the one who entered the Ryen home and committed the various murders, and that he is thus guilty beyond a reasonable doubt, of Counts Two through Six.... (P.Ex. No. 7, p. 8145.)
>
> Now, some of the more particular points persuading me of the defendant's guilt are the following: The proof showed, apart from his own statements at trial, that he was in the hideout home next door, in effect to the Ryen home, for several days. He admitted that indeed he could not deny it. He was next door at least until 8:30 p.m. the night of the murder, a fairly short period of time before the crimes occurred.
>
> I am convinced that the hatchet in evidence was one of the murder weapons and that it came from the hideout house where the defendant spent a lot of time.

> I am convinced that the defendant stole the Ryens car; I thought that that was adequately proved by the evidence found therein, particularly the tobacco, the same tobacco that was also found at the home was the same that comes from the state prison.

(*Id.* at 8146.)

Judge Garner further discussed the evidence linking the Ryen house to the hideout house where Petitioner had hid, including (1) Petitioner's blood found in the Ryen house, (2) evidence that established after the murders the killer returned to the hideout house where Petitioner stayed, took a shower and brought blood into that house, and (3) Petitioner's manner of flight out of the country as additional pieces of evidence that established Petitioner's guilt. (*Id.* at 8147-48.)

2. California Supreme Court Rulings and Findings

The California Supreme Court addressed the issue of Petitioner's guilt at length after his conviction:

> [T]he evidence of guilt was extremely strong. Many items of circumstantial evidence pointed to defendant's guilt. Some alone were quite compelling; others less so. In combination, the evidence established defendant's guilt overwhelmingly.

*955 First, there was the fact of defendant's escape and hiding out at the house nearest the crime scene at precisely the time of the crime. Defendant left the house the very night of the murders. The Ryen house could be seen from the Lease house. Since defendant's telephonic appeals for help had proved vain, he desperately needed a means to get out of the area, a means the Ryen station wagon could provide. The hatchet that was one of the murder weapons came from within the Lease house, near the window through which the Ryen house was visible. The sheath for this hatchet was found on the floor of the very room defendant slept in. Items that could have been the remaining murder weapons were missing from the Lease house.

In addition to these circumstances, there was the strong shoe print comparison evidence, the cigarette and tobacco comparison evidence, the match between defendant's blood type and the drop of blood in the Ryen house that was not from a victim, the bloodstained prison issue button on the Lease house floor, the bloodstained rope (not defendant's blood, consistent with a victim's blood) found in the closet of the bedroom defendant used, the blood in the Lease house shower and elsewhere, the hair comparisons, and the other evidence summarized earlier in this opinion.

It is utterly unreasonable to suppose that by coincidence, some hypothetical real killer chose this night and this locale to kill; that he entered the Lease house just after defendant left to

> retrieve the murder weapons, leaving the hatchet sheath in the bedroom defendant used; that he returned to the Lease house to shower; that he drove the Ryen station wagon in the same direction defendant used on his way to Mexico; and that he happened to wear prison issue tennis shoes like those of defendant, happened to have defendant's blood type, happened to have hair like defendant's, happened to roll cigarettes with the same distinctive prison issue tobacco, and so forth. Defendant sought to discredit or minimize each of these items of evidence, but the sheer volume and consistency of the evidence is overwhelming.

Cooper, 53 Cal.3d at 795-800, 281 Cal.Rptr. 90, 809 P.2d 865.

An analysis of some of the specific items of evidence the California Supreme Court set forth in their opinion is mentioned below:

After his escape from C.I.M. Cooper hid in the Lease Home, the closest house to the Ryen's residence for several days immediately prior to the murders.

The Ryen home was clearly visible from the Lease home. Various items of circumstantial evidence connected defendant with the massacre.

Defendant had been an inmate at CIM since April 29 under the name of David Trautman. On June 1, he was transferred to a minimum security

portion of the prison. The next afternoon, June 2, he escaped on foot.

Undisputed evidence, including fingerprints, showed that after his escape, defendant took refuge in a nearby house owned by Larry Lease and brothers Roger and Kermit Lang (hereafter the Lease house). He slept in the closet of the bedroom nearest the garage. The Lease house was the closest neighbor to the Ryen house, about 126 yards away. The window by the Lease house fireplace provided a view of the Ryen house.

*956 Kathleen Bilbia, an employee of Lease, had been living in the Lease house in May, and she had used the bedroom defendant later slept in (hereafter the Bilbia bedroom). She moved out of the house during May. By May 27, most of her belongings had been removed. On May 30 and June 1, Bilbia vacuumed and cleaned portions of the house, including the bathroom she had used (hereafter the Bilbia bathroom).

Cooper ended his final telephone call from the Lease house approximately one hour before the Ryen family and Chris Hughes returned home from a barbeque. Telephone records showed that two telephone calls were made from the Lease house to the Los Angeles area telephone number of Yolanda Jackson-one lasting one hundred ten minutes beginning on June 3 at 12:17 a.m., and one lasting four minutes beginning at 2:26 a.m. the same morning. Two calls were also made from that house to the Pittsburgh, Pennsylvania telephone number of Diane Williams-one lasting

three minutes beginning on June 3 at 11:46 a.m., and one lasting thirty-four minutes beginning on June 4 at 7:53 p.m. This final call was only an hour or so before the Ryens and Chris Hughes left the Blade house for their unsuspected rendezvous with death.

Yolanda Jackson testified that she visited defendant on May 30 at CIM. Sometime after midnight on June 3, she received a telephone call from defendant. She believed the call lasted about 30 to 45 minutes. Defendant said he had "walked out" of the prison. He asked her to help him in what Jackson believed was a "joking manner." She refused. Defendant asked her where he should go. She said she did not know. At one point in the conversation, defendant said he was getting a cigarette. Shortly after the first conversation ended, defendant called her again. A brief second conversation ensued.

The parties stipulated that if Diane Williams were called as a witness, she would testify that in June she received two telephone calls from defendant at her Pittsburgh number. Defendant told her that he had been released from prison because of a new law that had been passed, and that he needed money. She said she could not get any. He said he would call back. Defendant called Williams again the next day, and asked if she had gotten any money. She replied that she had not. On June 6, Williams received a collect call from defendant in Tijuana, Mexico.

On June 4, around 10 or 11 a.m., Virginia Lang visited the Lease house briefly to get a sweater. She noticed nothing out of the ordinary.

A bloodstained green button, identical to the buttons found on CIM inmate jackets was found in the Bilbia bedroom where Cooper slept. Blood from the button could have come from one of the victims or from Cooper.

After the murders, a bloodstained khaki green button was found on the rug in the Bilbia bedroom. It was identical in appearance to buttons on field jackets inmates wore at CIM, including one defendant was seen wearing shortly before his escape. The blood on the button could have come from defendant or one of the victims.

A bloodstained rope was found in the Bilbia bedroom closet. It was similar, but not identical, to a length of bloodstained rope found on the driveway of the Ryen residence.

*957 Luminol revealed the possible presence of blood in the shower of the Bilbia bedroom and on the rug in the hallway leading to the Bilbia bedroom. Cooper's footprint was found on the sill on this shower.

Human hair removed from the sink trap in the Bilbia bathroom of the Lease house was consistent with Jessica Ryen's hair. Hair removed from the shower in that bathroom was consistent with Doug Ryen's hair.

A criminalist from the San Bernardino County sheriff's crime laboratory sprayed various areas of the Lease house with luminol, a substance used to detect the presence of blood not visible to the naked eye. A positive reaction consisting of an even "glow" ranging from about two feet to five feet above the floor was obtained on the shower walls in the Bilbia bathroom. Defendant left his footprint on the sill of this shower. There were also four positive reactions to the luminol on the rug in the hallway leading to the Bilbia bedroom that appeared to be foot impressions. Other positive reactions were obtained in the bedroom closet and bathroom sink. The reactions did not prove the presence of blood, but were "an indication that it could be blood."

Investigators found matted hair in the bathroom sink trap that appeared to have been there a long time. Other hair was not matted. A microscopic examination of one of the latter revealed characteristics similar to Jessica's head hair. A hair removed from the bathroom shower had characteristics similar to Doug Ryen's head hair.

The hatchet taken from Lease house where Cooper hid was found on the side of the road leading away from the Ryen home.

Human hairs on the hatchet were consistent with those of Doug and Jessica Ryen. The blood on the hatchet was consistent with that of Josh Ryen.

The sheath that covered the blade of the hatchet was found in the "Bilbia" bedroom where Cooper stayed.

During the afternoon of June 5, a local citizen discovered a hatchet in some weeds next to a fence on the side of a road that led from the Ryen home out of the area. The fencepost above the hatchet had a small indentation indicating that something sharp had struck it. The hatchet was covered by bloodstains; its head was covered by dried blood and human hairs. Some of the hairs were consistent with those of Doug and Jessica Ryen. Some of the blood on the hatchet head could have come from Josh. Dr. Root, who performed the autopsies, concluded that the hatchet could have inflicted the chopping wounds.

Witnesses identified the hatchet as missing from the Lease house after the killing. It had been kept in a sheath by the Lease house fireplace. Bilbia recalled seeing it by the fireplace when she was cleaning the house. On June 7, the sheath for the missing hatchet was found on the floor in the Bilbia bedroom. It had not been there when Bilbia vacated the room.

Buck knives and an ice pick, which could have inflicted some of the injuries on the victims, were missing from the Lease house where Cooper hid. A strap fitting one of the missing knives was found in the bedroom Cooper used.

Some buck knives and one or more ice picks were also missing from the Lease house. These could

have inflicted the remaining injuries. A strap fitting one *958 of the missing buck knives was found on the floor by the Bilbia bedroom closet.

Three separate ProKed Tennis Shoe impressions, consistent with the size and pattern of the shoes given to Cooper at CIM were found in the following locations:

1) in the game room at the Lease house,

2) on the spa cover outside the Ryen master bedroom (which was the scene of the murders);

3) and in blood on the bed sheet in the Ryen master bedroom.

Investigators found three significant shoe print impressions-a partial sole impression on a spa cover outside the Ryen master bedroom, a partial bloody shoe print on a sheet on the Ryen bedroom waterbed, and a nearly complete shoe print impression in the game room of the Lease house. All three appeared to come from tennis shoes.

James Taylor, an inmate at CIM who played on the same prison basketball team as defendant, issued equipment to other inmates. He testified that he issued defendant a pair of P.F. Flyer tennis shoes. Three or four days before defendant was transferred to minimum security (*i.e.*, before June 1) defendant exchanged these shoes for a pair of "Dude" Pro Ked tennis shoes. Taylor did not remember what size shoes were issued to defendant. The Stride Rite Corporation sells Pro

Ked tennis shoes to the state for use in institutions such as CIM. All "Dude" tennis shoes contain the same sole pattern. The general merchandise manager for Stride Rite testified that this pattern is not found on any other shoe that the company manufactures nor, to his knowledge (which was extensive), on any other shoe. The shoes are not sold retail, but only to states and the federal government.

William Baird, the manager of the San Bernardino County sheriff's crime laboratory, compared the shoe print impressions from the Ryen and Lease houses to each other, to the type of shoes issued to defendant, and to other shoes. He concluded that the three shoe prints "all possessed a similar tread pattern, which would indicate a similar type shoe was used in each case." They "are consistent with one another, and ... could have been caused by the same shoe." The pattern was similar to the "Dude" tennis shoes used at CIM, probably size 10, but possibly size 9. Baird searched area stores for shoes with similar sole patterns, but could find none. The defendant testified that his shoe size was between nine and ten. Baird believed that the shoes that made the three impressions were nearly new but not brand new.

The Ryen family station wagon was taken after the murders. Bloodstains located inside the station wagon had the same blood type as some of the victims. The station wagon that was missing from the Ryen house was found on a church parking lot in Long Beach. One witness testified he put a

flyer on the car on Sunday morning, June 5, the morning after the killing of the Ryen family. Another saw the car on June 7. Later, the vehicle was reported to the police, who examined it for evidence.

The car contained various bloodstains, including one which could have come from one or more of the victims, but not defendant. Several hairs were recovered from the vehicle. Two criminalists microscopically compared the hairs with defendant's hair. One believed that one ***959** of the hairs probably came from a Black person, and that "there was enough similarity between ... the hairs from Mr. Cooper and the unknown hair that I felt the unknown hair was consistent with coming from Mr. Cooper." The second criminalist also found it was consistent with defendant's hair. Both believed it was most likely pubic hair. Unlike fingerprint comparison, an absolute match is not possible when comparing hairs.

Loose prison issued "Role-Rite" tobacco was found in both the closet of the Bilbia bedroom in the Lease house where Cooper slept and on the floor board of the Ryen station wagon when it was recovered in Long Beach.

James Taylor, the inmate who issued the Pro Ked tennis shoes to defendant at CIM, testified that he saw defendant smoke hand-rolled cigarettes using rolling paper and "Role-Rite" tobacco issued free to inmates. This tobacco is not sold retail, but only to institutions in California such as CIM.

Loose tobacco was found inside a white box in the Bilbia closet, and in the Ryen car. In addition, two cigarette butts-one of a hand-rolled cigarette-were found in the Ryen car. The tobacco in the white box was identified as Role-Rite. Criminalist Craig Ogino examined visually and microscopically the two samples of the loose tobacco and the tobacco from the hand rolled cigarette. Each sample was consistent with each other and with Role-Rite tobacco. Ogino also compared them with various other tobacco samples he obtained from a tobacco store. The other tobacco samples were all different.

Aubrey Evelyn, a manager with the company that manufactures Role-Rite tobacco, also testified that he had "no doubt" that the tobacco found in the Ryen car was Role-Rite.

Examination of the saliva on the two cigarette butts from the Ryen car was inconclusive, but was consistent with the cigarettes having been smoked by a nonsecretor such as defendant. Some commercial cigarettes were apparently missing from the Lease house. A Viceroy cigarette butt was found in the Bilbia bedroom. Bilbia did not smoke.

A six-pack of Olympia Gold beer with one can missing was found in the refrigerator of the Ryen house. One bloodstained can was hanging over the edge of a shelf. A nearly empty can of Olympia Gold beer similar in appearance to those in the Ryen refrigerator was found in a plowed

horse training arena about midway between the Ryen and Lease houses.

When Cooper was arrested weeks later he was still in possession of several items taken from the Lease home.

On June 9, defendant met Owen and Angelica Handy in Ensenada, Mexico. Defendant, using the name Angel Jackson, asked for work. Handy offered defendant some food and a place to stay if he would help paint their boat, the Illa Tika. Defendant agreed. After working on the boat for two days, defendant and the Handys set sail for San Francisco. They made several stops, then eventually went to Pelican Bay near Santa Barbara, where they stayed for four or five days. The Coast Guard arrested defendant at that location after he dove off the Illa Tika, swam to a dinghy, and started to row for shore. While he was with the Handys, defendant possessed several items identified as coming from the Lease house.

***960** [15.] A drop of blood collected in the hallway at the Ryen home could not have come from any of the victims. When analyzed many of the serum protein and enzyme types of that drop of blood matched Cooper's profile.

With one exception, all of the blood samples obtained from the Ryen house could have come from one or more of the victims. The exception is a single drop of blood found on the hallway wall opposite the master bedroom door.

Daniel Gregonis, a criminalist with the San Bernardino County sheriff's crime laboratory, examined this drop of blood by a scientific process called electrophoresis. Human blood contains various enzymes and serum proteins. The types of enzymes vary from person to person. Electrophoresis is a technique used to distinguish between enzyme types, so as to exclude or include a person as a possible donor of a blood sample. After electrophoretic testing, Gregonis concluded that the drop could not have come from any of the victims.

Based upon results obtained for several enzymes, Gregonis also concluded that the drop was consistent with defendant's blood. Results for certain other enzymes were inconclusive. Because of various characteristics, the blood had to have come from a Black person such as defendant. One of the enzymes tested is commonly called "EAP." Gregonis initially believed the EAP of the drop of blood was type B. When he later typed defendant's own blood, Gregonis also believed it was EAP type B. Gregonis subsequently learned that defendant's EAP type was RB, a rare type. Gregonis had never before seen an RB type. He reexamined the photograph of the original testing of the drop of blood, but it was inconclusive as to whether it was EAP type B or RB. Gregonis testified, however, that when he tested the drop of blood, it appeared to have the same EAP type as defendant's blood. Brian Wraxall, another expert, described the difference between types B and RB as "fairly subtle."

Before Gregonis learned of his error regarding defendant's EAP type, he and Dr. Edward Blake, an expert employed by the defense, tested the drop further. Because of the limited amount of the remaining sample, they performed tests that they believed had the best chance of excluding defendant as a possible donor. They did not retest for EAP. The additional tests tended to include defendant as a possible donor. Only a minute amount of the blood remained after these tests. Later, after Gregonis learned of his error regarding defendant's EAP type, he tried to test the remaining sample for EAP. Dr. Blake was again present. This final test completely consumed the sample and was inconclusive.

Electrophoretic testing also established the blood on the rope found in the Bilbia bedroom closet could have come from one of the victims but not defendant.

Cooper, 53 Cal.3d at 795-800, 281 Cal.Rptr. 90, 809 P.2d 865.

In the latest petition, the California Supreme Court denied Petitioner's claims on the merits and as procedurally barred, finding that "[a]s with the previous five petitions for writ of habeas corpus that petitioner has filed in this court challenging the judgment, this petition casts no doubt on petitioner's guilt or the validity of the judgment." *In re Cooper*, Case No. S122389. This Court agrees.

***961**

3. Federal Court Findings and Conclusions Confirmed Petitioner's Guilt and Rejected Petitioner's Constitutional Claims

This Court previously reviewed the entire trial court proceedings, the parties extensive briefings, and subsequently conducted an evidentiary hearing. After this thorough review, this Court concluded that (1) Petitioner was represented by an experienced and able trial attorney, (2) Petitioner's trial and appeal were constitutionally conducted, (3) Petitioner was convicted by overwhelming evidence of guilt, and (4) the jury properly weighed the aggravating and mitigating evidence in concluding that four brutal murders justified the death penalty. *Cooper I,* 92-CV-427, Aug. 25, 1997 Order at 1. Thereafter, the Ninth Circuit Court of Appeals affirmed this Court and likewise concluded that Petitioner was convicted by "overwhelming evidence of guilt." *Cooper*, 255 F.3d at 1114-15; *Cooper I,* 92-CV-427, Aug. 25, 1997 Order at 1-3, 49-50, 104-05. The United States Supreme Court denied Petitioner's petition for wit of certiorari regarding this Court's denial of his first habeas petition and the Ninth Circuit's affirmance of this Court's denial of his first petition. *Cooper*, 524 U.S. 963, 118 S.Ct. 2392, 141 L.Ed.2d 757 (1998); *Cooper*, 537 U.S. 861, 123 S.Ct. 238, 154 L.Ed.2d 100 (2002).

4. State Court Post-Conviction Evidentiary Hearing

Significantly, the state court conducted a post-conviction evidentiary hearing on June 23-25, 2003.

The state court concluded that Petitioner "has not made any showing that law enforcement personnel tampered with or contaminated any evidence in this case." (92-CV-427, NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order dated July 2, 2003 at 10.)

D. Petitioner's Allegations Do Not Meet the Burden of Establishing Actual Innocence

In this successive petition, the Court heard from forty-two witnesses and reviewed numerous exhibits. After thoroughly considering the evidence and submissions of the parties, the Court denies Petitioner's claims.

1. Canyon Corral Bar

Petitioner contends his innocence is "corroborated" by the actions of others who "likely were involved" in the Ryen/ Hughes murders. (Pet.¶ 60.) Petitioner focuses on the same persons-three white males at the Canyon Corral Bar the night of the murders-that he tried to direct suspicion toward at trial. *(Id.)* The Court concludes that the Canyon Corral bar information does not undermine the evidence of Petitioner's guilt.

None of the Canyon Corral bar witnesses are able to refute the physical evidence collected at the crime scene or the post-conviction DNA evidence linking Petitioner to the crime. The blood from the crime scene, A-41, recovered at around 12:25 a.m. on June 6, 1983 came from an African American individual, (93 RT 4424), and post-conviction DNA tests confirmed that it was Petitioner's blood (1 in 310

billion). *(See* Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 1-2.) None of the bar witnesses describe an inebriated African American individual with blood. As such, the evidence from the bar does not undermine Petitioner's guilt.

Petitioner alleges that on the night of the murders three strangely acting patrons covered in blood were asked to leave the Canyon Corral Bar. (Pet.¶ 97.) At trial, the defense tried to cast suspicion away ***962** from Petitioner by calling bartender Ed Lelko to testify that three men entered the bar that night and later left without incident after being refused service for being too drunk. Lelko did not notice any blood on the men. In fact, none of the people known to be at the Canyon Corral bar on the night of the murders noticed blood. (Answer, Ex. 18, at 1; Answer, Ex. 22, at 1; Answer, Ex. 24, at 2; Answer, Ex. 28, at 1; Answer, Ex. 30.) Petitioner's support for his allegation comes from people who over twenty years after the fact allege to have been patrons in the bar: Lance Stark Mary Mellon-Wolfe, Christine Slonaker, Randy Mansfield and Al Ward.

In order to address the issues raised by Petitioner's successive petition, the Court held an evidentiary where several people at the bar that night testified. These people had previously given police interviews the day following the murders and/or testified at trial. These included the

bartender Edward Lelko,[38] the bar manager Shirley Killian, two waitresses, Virginia Mansfield and Kathleen Royals, and several bar patrons, including Lester Land, Linda Paulk and Pamela Smith. Lelko, Killian, Mansfield, Royals, Land, Paulk and Smith confirm their earlier statements and testimony that there were no men in the bar that night with blood on their clothes or faces and that the police did not come to the bar that night.

The Court also heard testimony from Lance Stark, Mary Mellon-Wolfe, and Christine Slonaker. Deputy Rodney Ray Hoops who was on patrol the evening of the murders also testified. At the request of Petitioner, the Court heard from Alfred Eugene Ward, Sr., who testified that he was at the Canyon Corral Bar on the night *before* the murders, Friday, June 3, 1983, one night too soon to be relevant. He specifically recalls seeing three young white males wearing extremely bloody T-shirts. (8/25/04 HRT 37.) If Mr. Ward is credible, his testimony refutes Petitioner's theory and is consistent with Randy Mansfield's testimony that it was not unusual for patrons to come into the bar with blood on their clothes from the slaughterhouses in the area.

---

[38] The Court held the hearing in Riverside, California as Mr. Lelko was facing major surgery for lung cancer and unable to travel. (*See* 04-CV-656, Doc. No. 100.)

a. Evidentiary Hearing Testimony of Bar Employees and Patrons Who Were Interviewed After the Murders and/or Testified at Trial

Edward Lelko testified he was the bartender at the Canyon Corral Bar on the night of the murders. (6/25/04 HRT 5.) Lelko stated that he saw three men wearing Levi jeans. (6/25/04 HRT 18.) Lelko confirmed that one of the men was wearing a light colored T-shirt. (6/25/04 HRT 84.) The men were not wearing coveralls. (6/25/04 HRT 18.) Lelko did not call the police and did not see a police officer in the bar that night. (6/25/04 HRT 19-21.)

Shirley Killian was the manager of the Canyon Corral Bar in June 1983 and recalled the three men at the bar. (6/29/04 HRT 106-09.) She was not working on the night of the murders but was at the bar. (6/29/04 HRT 106.) She did not see any blood on the men's clothing or their persons. (6/29/04 HRT 111.) One of the men was wearing a light colored T-shirt and blue jeans. (6/29/04 HRT 133, 140-41.) She did not call the police. (6/29/04 HRT 109.) Killian went outside when the three men left and she saw one get into a pickup and another one get into a smaller ***963** car. (6/29/04 HRT 108.) Kathleen Royals was a waitress at the bar in June 1983.(6/29/04 HRT 148.) She served the three men drinks. (6/29/04 HRT 153.) She described them as clean-cut men and recalled they wore jeans and one or two of them wore a T-shirt. (6/29/04 HRT 153.) She did not notice any blood on their clothing or their persons. (6/29/04 HRT 153.) She did not call the police, was not aware of anyone calling the police

and did not see any officers in the bar that evening. (6/29/04 HRT 154.)

Linda Paulk was a patron at the bar and testified that three clean-looking men entered the bar on the night of the murders. They looked like they were military personnel. (6/28/04 HRT 183, 187.) They all wore T-shirts and had short haircuts. (6/28/04 HRT 183.) One wore a white T-shirt. (6/28/04 HRT 184.) Ms. Paulk stated she did not notice blood on any of the three men. She did not see anyone with coveralls. (6/28/04 HRT 187.)

Pamela Smith was a patron at the bar on the night of the murders. (6/28/04 HRT 202.) She noticed three men at the bar. (6/28/04 HRT 203-04.) The three men were in their 20's wearing T-shirt and jeans. (6/28/04 HRT 205.) One man had a T-shirt with a logo making Ms. Smith think he liked heavy metal bands. (6/28/04 HRT 204-05.) Ms. Smith stated that she did not notice any blood or stain on the three men's clothing. (6/28/04 HRT 209.) She did not see a police officer at the bar. (6/28/04 HRT 209.) After hearing about the murders, Ms. Paulk and Ms. Smith, contacted the Sheriff's Department regarding the three men at the bar. (6/28/04 HRT 187-88.)

Virginia Mansfield is married to Larry Mansfield and the daughter in law of Shirley Killian, the manager of the bar. (6/29/04 HRT 81.) She was a waitress at the Canyon Corral Bar along with Kathleen Royal. (6/29/04 HRT 82.) On June 5, 1983, she reported to the police that one of the men wore a "white short-sleeved cotton shirt (not an undershirt)." (6/29/04 HRT 91.) She did not see

anyone with clothing that had blood on it. (6/29/04 HRT 83.) She does not recall seeing a uniformed officer inside the bar that night and she was not aware of any problems in the bar that evening. (6/29/04 HRT 83.)

Lester Land was the maintenance man, bouncer and sometimes bartender at the Canyon Corral Bar and was at the bar the night of the murders. (6/29/04 HRT 2-3.) Mr. Land remembered three men but did not remember what they looked like. (6/29/04 HRT 6.) He did not notice anyone with blood on their clothing and did not recall seeing a law enforcement officer inside the bar. (6/29/04 HRT 10.)

Land's interview by Detective Wilson on June 5, 1983 was documented in a police report. (Resp't Evid. Hearing, Notebook 11, Ex. AAAA.) He stated that there were three white men that arrived around 9:00 p.m. They were in their 20's. One guy had very short light colored hair and wore a plaid shirt, the second male had short black hair wearing a light colored plaid shirt and the third male had shoulder length dark colored hair. He stated that they left the bar and returned a short time later pretty intoxicated. (Resp't Evid. Hearing, Notebook 11, Ex. AAAA.)

The credible version of the three men in the Canyon Corral Bar comes from those who were interviewed at the time of the crimes. The two waitresses and bartender who were working the night of the murders, the manager of the bar who stopped by that night, as well as three patrons at the bar that night, were interviewed by authorities close

in time to the murders. ***964** (6/05/04 HRT 17; 6/28/04 HRT 187, 196, 226; 6/29/04 HRT 3, 6, 89, 126.) Ed Lelko, the bartender was interviewed within three days of the murders. (102 RT 6526-27, 6529.) The bar's manager, Shirley Killian, was interviewed on June 5, 6, and 8, 1983. (106 RT 7649.)

Lelko was called as a witness by the defense to cast suspicion on the three strangers in the Canyon Corral Bar for the Ryen/Hughes murders. At trial, he testified that around 9:00 p.m. three Caucasian men entered the bar who were not "regulars." Each man had a short, military-style haircut, and all were wearing light-colored T-shirts and Levis; none wore coveralls. (102 RT 6530, 6536, 6538.) The men spent about 15 to 20 minutes in the bar before leaving. The three men returned around 11:30 p.m. One was noticeably inebriated. The waitress refused them service and they left the bar without incident. (102 RT 6531.) Lelko noticed no blood on their T-shirts. (102 RT 6533, 6544.)

At trial, Killian was called as a rebuttal witness by the prosecution. She saw three young men with close-cut, military style haircuts. They wore light colored T-shirts. She did not see any blood or stains on their clothing. (106 RT 7641, 7645.) The men were "cut-off" from further drinks. They did not seem upset and left the bar around 11:30 p.m. (106 RT 7647.)

b. Evidentiary Hearing Testimony of Lance Stark, Mary Mellon-Wolfe, Christine Slonaker, Randy Mansfield, and Al Ward

The Court also heard from the descriptions of the men supposedly at the bar that night provided by Petitioner's witnesses. Lance Stark testified at the evidentiary hearing. (7/23/04 HRT.) He claims he was at the bar the night of the murders and saw three men come into the bar that night who were making inappropriate comments to some women sitting at the bar. (7/23/04 HRT; Pet'r Evid. Hr'g, Ex. 30.) As an initial matter, Stark was known to the defense at trial so that information may not be the basis of an actual innocence claim. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489. At trial, Petitioner was provided information from the San Bernardino Sheriff's Department ("SBSD") that Stark claimed to have seen "subjects" in the Canyon Corral Bar on the night of the murders and that he talked to them and saw their vehicle. *(See* 04-CV-656, NOL of Blue Slip Re Lance Stark, Doc. No. 202).

During his testimony before this Court, Stark claimed to have initially seen two white men on the night of the murders, who were visibly intoxicated. (7/23/04 HRT 28.) Later, Stark stated that he saw three men leave the bar. (7/23/04 HRT 40.) The men appeared dirty looking and not clean cut. (7/23/04 HRT 60.) One of the men had a short military style haircut that was light and unkept, and was wearing a pair of blue jean "Farmer John" bib overalls with the top half down. (7/23/04 HRT 23-24, 85, 97.) Stark testified that the man in the "Farmer John" bib

overalls also had a light T-shirt on with what appeared to be some grease or mud stains, and he had a tattoo on his right shoulder. (7/23/04 HRT 23-24.)

Stark further testified that after he heard the men talking about how they were in a bar fight he thought that maybe the substance on one man's shirt he thought was grease or mud may have been blood, but he was not sure about the substance. (7/23/04 HRT 23, 64.) At the time, the incident did not stick out in ***965** Stark's mind and he thought it was not significant, even after he learned of the murders in Chino the next day. (7/23/04 HRT 95.) In fact, Stark stated that he had not thought about this incident beyond the day it happened until nearly twenty years later when a defense investigator came and visited him in early to mid 2004. (7/23/04 HRT 95.) Because of the twenty year gap between the incident at the Canyon Corral Bar and Stark's effort to recall, he is not even sure if the incident happened the night of the murders on June 4, 1983. (7/23/04 HRT 95-96.) He states that he knows on some date that these three men came to the Canyon Corral Bar but he cannot personally correlate that date to the night of the murders. (7/23/04 HRT 95-96.)

At the evidentiary hearing, Mary Mellon-Wolfe described spots of blood on the front of one of the men's T-shirt and a small amount of blood on his upper lip. (6/28/04 HRT 123-24, 164-65.) Wolfe said his shirt was a "light tan or white, off white shirt [ ] with jeans" and that he had longer hair than the other two men, who had "really short hair." (6/28/04 HRT 121-23.) One of the other men was wearing tan

coveralls that were "zipped down and thrown over" down to his waist. (6/28/04 HRT 121-22.) The three were refused service shortly after arriving and they left without incident. (6/28/04 HRT at 125-26.)

In contrast, Slonaker's declaration describes two white men with blond hair in their 20's. (6/28/04 HRT 21.) One was wearing a light colored T-shirt and jeans and the other man was wearing coveralls with buckles. (6/28/04 HRT 21-22.) They were "all covered in blood." (Traverse, Ex. 212 at 2.) During her testimony, she described the man in a white or dirty T-shirt and jeans with blood "[a]ll over him. It was on his arms. It was all over his face. It was on his-it was all over his shirt. It was on his feet and on his shoes. It was everywhere." (6/28/04 HRT 25.) She then testified that the men were refused service and left the bar. (6/28/04 HRT 26-27.) Both Mellon-Wolfe and Slonaker describe an incident where the men approached them at the bar and began hitting on their friend, who had on a low cut blouse. (6/28/04 HRT 23-24; 6/28/04 HRT 120-21.)

Petitioner also presented the testimony of Randy Lee Mansfield, the son of the bar manager Shirley Killian. (8/25/04 HRT 87.) He said he worked at the bar practically every night back at the time of the murders. (8/25/04 HRT 81, 93.) Mr. Mansfield testified that a couple of men wearing butcher smocks with blood on them came into the bar on some day around the time of the murders, but that he could not place the men in the bar the day of the murders. (8/25/04 HRT 86-87.) Mr. Mansfield testified that these men were Hispanic with dark hair and appeared to work at one of the local

slaughterhouses. (8/25/04 HRT 84-85.) The men came into the bar during the day and were wearing butcher smocks, the kind that tie behind the back. Since there were several slaughterhouses in the area, Mr. Mansfield made the logical conclusion that these men were simply coming from work and that is why they had blood on them. (8/25/04 HRT 94.) He did not think anything of these men even after he learned of the murders. (8/25/04 HRT 84-85.) Moreover, Mr. Mansfield is not sure when he saw these men, but he does recall that he was not alarmed when he saw them and did not call law enforcement. (8/25/04 HRT 97-98.)

***966** The observations of the employees and patrons at the bar the night of the murders all confirm the trial testimony of Lelko and Killian, and contradict the accounts of Stark, Mellon-Wolfe, and Slonaker. The sworn declarations of a number of employees and patrons who were also at the bar that night contradict the information belatedly recounted by Stark, Mellon-Wolfe, and Slonaker. *(See* Answer, Exs. 18 (Lelko Decl.); 20 (Killian Decl.); 22 (Mansfield Decl.); 24 (Royals Decl.); 26 (Paulk Decl.); 28 (Smith Decl.); 30 (Land Decl.).) The three belated and inconsistent accounts on which Petitioner relies are simply not credible evidence, let alone clear and convincing evidence that would rebut the presumption of correctness attached to the state courts' implied and express factual findings. See 28 U.S.C. § 2254(e).

Petitioner requested an evidentiary hearing with Al Ward and learned prior to the testimony that he would not corroborate Petitioner's theory because he

would testify that he was there on Friday night, a day too early to be relevant. Petitioner claims that the Court erroneously ordered Al Ward to testify. However, Petitioner's request for evidentiary hearing requests the testimony of Al Ward and Al Warren. (04-CV-656, Doc. No. 121 at 13.) The request specified that Al Warren was not there the night of the murders. (04-CV-656, Doc. No. 121 at 13.) Since Ed Lelko was the bartender on the night of the murders, he confirmed that Al Warren was not bartending the night of the murders. (6/25/04 HRT 5.) Al Warren had a stroke and is deceased. (4/22/05 HRT 45.)

Mr. Ward, an African American individual, testified that he was at the Canyon Corral Bar on the night before the murders, Friday, June 3, 1983, and that he specifically recalls seeing three young white males wearing extremely bloody T-shirts. (8/25/04 HRT 46.) Mr. Ward testified that this was his only visit to the Canyon Corral Bar. (8/25/04 HRT 45.) Mr. Ward worked at the El Toro Marine Corps Air Station and that he would drive by the Canyon Corral Bar every weeknight on his way home. He did not work on Saturday, so he was not in the bar on the night of the murders. (8/25/04 HRT 42.) As a family man, he never stopped at the bar. (8/25/04 HRT 45.)

On Friday night, June 3, 1983, Mr. Ward testified that he was driving home from work just before midnight, as he did every weeknight, when he came across a couple whose car had broken down on Carbon Canyon Road approximately eight miles from the Canyon Corral Bar. (8/25/04 HRT 42-43.)

Mr. Ward gave the couple a ride to the bar and they invited him in for a drink to thank him for helping them. (8/25/04 HRT 44.) As he was walking in the bar, Mr. Ward testified that he saw three men coming from around the back of the bar that had unmarked T-shirts covered in blood. (8/25/04 HRT 46.) Mr. Ward testified that he was approximately ten feet from the men and they were covered all over in blood. It was on the front of their shirts and all over their arms and skin. (8/25/04 HRT 64.) The men also were all wearing similar khaki pants and similar shoes. (8/25/04 HRT 66.) Two of the men had blond hair and the third man had sandy brown hair. (8/25/04 HRT 48.) Two of the men had shorter hair while the third man with blond hair had longer hair tucked into the back of his T-shirt. (8/25/04 HRT 48.) Mr. Ward and the couple he picked up proceeded into the bar and Mr. Ward had one beer and left shortly after midnight. (8/25/04 HRT 45-46.) In total, Mr. Ward ***967** testified that he was at the bar twenty minutes. (8/25/04 HRT 45.)

Both parties expressed doubt about the credibility of Mr. Ward. (4/22/05 HRT 45.) However, Mr. Ward's testimony may explain why Stark, Mellon-Wolfe, and Slonaker recall seeing men with blood on them at the bar. Yet Mr. Ward specifically recalls seeing the bloody men at the bar on Friday, a day too early for it to be relevant. Given that all of the bar employees and patrons interviewed contemporaneously after the murders and/or testified at trial and before this Court, recall no bloody men at the bar on the night of the murders, the Court concludes that the testimony of the witnesses from the trial have greater weight

compared to the additional witnesses whose recollections over twenty years later are not as reliable.

c. Detective Wilson

Detective Timothy Wilson of the San Bernardino Sheriff's Department testified that nothing about three men covered in blood had come up in his interviews and investigation into any suspicious men being at the bar the night of the murders, Saturday, June 4, 1983. (8/26/04 HRT 78.) Later, he heard hearsay information. Det. Wilson is not sure where he heard this information, it may have been from any number of hearsay sources such as the newspaper or "word on the streets." (8/26/04 HRT 76.) The information did not come from his investigation or interviews with witnesses. (8/26/04 HRT 78.)

2. No *Brady* Violation Regarding Canyon Corral Bar

After reviewing all of the evidence and hearing from the witnesses, the Court concludes that the more credible version of the events at the Canyon Corral Bar the night of the murders comes from the bar employees and patrons interviewed shortly after the murders who also testified at the trial. At the evidentiary hearing, these credible witnesses testified on the night of the murders, there were no bar patrons with blood on them and the police were not at the Canyon Corral Bar.

Petitioner argues that the prosecution withheld evidence that a police officer was called to the Canyon Corral bar the night of the murders. The Court disagrees, and the extensive evidentiary hearings do not support Petitioner's claim.

For example, Mellon-Wolfe admitted that she had no recollection of seeing a uniformed officer inside the bar, and believed she was confusing the night of the murders with another night at the bar when a uniformed officer came into the bar, and she saw the officer speaking to the woman manager of the bar. (6/28/04 HRT 173, 175.)

Slonaker's testimony and declaration similarly have changed. In her declaration, she stated a uniformed officer came into the bar. (Traverse, Ex. 212 ¶ 11.) In her testimony, however, she stated that no uniformed police officer came into the bar the night of the murders. She now claims that as she got up to leave the bar by way of the back door, she looked out the open front door of the bar and saw a uniformed officer outside the bar wearing tan pants and a tan shirt, not the uniform of the Sheriff's officers. (6/28/04 HRT 73-75, 80.)

Randy Mansfield testified that he did not call law enforcement. (8/25/04 HRT 97-98.) Since there were slaughterhouses in the local vicinity, Mansfield was not alarmed at seeing a couple of men wearing butcher smocks with blood. (8/25/04 HRT 84-85.) Bartender Edward Lelko, bar ***968** manager Shirley Killian, two waitresses, Virginia Mansfield and Kathleen Royals, and several bar patrons, including Lester Land, Linda Paulk and Pamela Smith did not

see men with blood on them or see the police at the bar. (6/25/04 HRT 17; 6/28/04 HRT 123-24, 187, 189, 209; 6/29/04 HRT 10, 19, 83, 88, 111, 153-54; see also Answer, Ex. 18 at 1; Answer, Ex. 22 at 1; Answer, Ex. 24 at 2; Answer, Ex. 28 at 1; Answer, Ex. 30.)

The seven witnesses who were at the bar that night all confirmed that there was no reason to call the police to the bar and that none placed an officer in the bar that night. (6/25/04 HRT 19, 21; 6/28/04 HRT 209; 6/29/04 HRT 10, 35, 83, 109, 154.) In addition, Respondent also produced the dispatch log from the Sheriff's Department for the night of the murders, and there was no call for assistance from the bar. (Resp't. Evidentiary Hearing Notebook 12, Ex. MMMM; *see also* 6/29/04 HRT 47, 53-54 (Dep. Rodney Hoops testimony)).

Deputy Rodney Hoops, the deputy sheriff patrolling the area that included the bar from 3:00 p.m. to 11:00 p.m. on June 4, 1983, credibly testified that he did not go to the Canyon Corral Bar that night and that he did not hear any broadcast over the radio relating to the bar or its immediate vicinity. (6/29/04 HRT 45, 47.) No other law enforcement agency would respond to the bar unless a mutual aid request was made, and the request would come from the Sheriff's Department and be reflected on the dispatch log. (6/29/04 HRT 47.)[39]

---

[39] The Court also heard testimony from Det. Wilson that when he was a deputy at the west end station, he would regularly check on the Canyon Corral Bar. (8/26/04 HRT.) This is consistent with Dep. Hoops testimony that he would regularly check on the bar when he was on patrol. (6/29/04 HRT at 76-

Paul Beltz, a SBSD officer, testified that he was in the parking lot of the Canyon Corral Bar when he got the call to the Ryen home on June 5th at approximately 12:48.(8/25/04 HRT 8.) He got the call the morning of June 5th when the bodies were discovered. Beltz was not at the Canyon Corral Bar parking lot on the night of the murders.

Also, the law enforcement officer in tan pants Slonaker claimed to have seen outside that bar on the night of the murders does not match the uniform of the San Bernardino Sheriff's deputy. Their uniforms consisted of forest green pants. (6/29/04 HRT 59; *see also* Resp. Evidentiary Hr'g Ex. TTTT (picture of uniformed San Bernardino Sheriff's Officer); 8/13/04 HRT (testimony of San Bernardino Sheriff's Dispatch Supervisor Debra Holman that Ex. TTTT is the uniform worn by the San Bernardino Sheriffs with green pants).)

After conducting an extensive evidentiary hearing, the Court concludes that there was no Brady violation based on the absence of a report form in response to the Canyon Corral Bar the night of the murders. The evidence, including Petitioner's own witnesses disputes Petitioner's claim that a uniformed officer came to the bar the night of the murders. In addition, the employees on duty and the patrons in the bar were aware of what transpired

---

77.) But as Dep. Hoops testified, if there was nothing to report from the bar check, then there would be nothing noted on the log. (Id.) Thus, even if there were a bar check the night of the murders, there were no incidents to report, such as bloody men, since nothing is reflected on the logs.

with the three men in question, and the defense had the benefit of that information before trial and elicited testimony during trial of *969 the events at the bar that night. (Answer, Ex. 35.) Therefore, Petitioner's allegations do not present a viable *Brady* claim.

3. Daily Logs and Dispatch Information Available at Trial to the Defense

On August 8, 1983, and January 16, 1984, Petitioner's defense counsel David Negus filed a subpoena duces tecum for materials that included "the complete daily logs, dispatch records, tape recordings of dispatch or communications made from June 2, 1983 to July 31, 1983, by the Sheriffs or any deputy of the SBSO concerning the investigation and search for suspects in the deaths occurring at [the Ryen home] and the escape and attempt to apprehend David Trautman, aka: Kevin Cooper, from CIM on June 2, 1983." (I CT 75-76.) Negus' declaration stated in his request: "The logs, dispatch records, and tape recordings include actions of officers which may not be memorialized in reports. The actions are relevant to the integrity of physical evidence, other suspects to the crime, and the issue of flight." (I CT 90.)

On September 2, 1983, after the state's compliance, defense trial counsel David Negus stated to the court that the daily logs had been received:

> I can indicate to the court that with respect to the four items in the amended subpoena [*see* I CT 75-76], that with respect to Item 1 [complete daily

> logs, dispatch records, tape recordings of dispatch or communications made from June 2, 1983, to July 31, 1983], all items except the tapes that were requested have been received.

(IV RT 6.)

Also, John Kochis, one of the prosecuting attorneys at the Petitioner trial, testified that the San Bernardino Sheriff's daily logs from June 4-6, 1983 (Resp't Evidentiary Hr'g Exs. MMMM-PPPP), were subject to a subpoena duces tecum filed by the defense and those documents were released to the defense directly by the San Bernardino Sheriff's Department. (8/13/04 HRT 183.)

Petitioner points to the June 5, 1983 daily logs of the San Bernardino County Sheriff, which lists in the incident detail of the Ryen/Hughes murders a description of the suspect vehicle as a Buick station wagon "occupied by three young males." *(See* Resp't Evidentiary Hr'g, Ex. NNNN at 9; *see also* Resp't Evidentiary Hr'g, Ex. RRRR (handwritten page by Holman having information on the suspect vehicle); Resp't Evidentiary Hr'g, Ex. SSSS (teletype dispatches regarding the suspect vehicle).) The Court held an evidentiary hearing on August 13, 2004, to address the Sheriff's daily log, where dispatchers Nancy Simendich and Debra Holman testified. (8/13/04 HRT 4, 78.) Both Simendich and Holman were on duty the day the murders were discovered, June 5, 1983. (8/13/04 HRT 10-11, 79-80.) Neither Simendich nor Holman had any independent recollection of the suspect vehicle or who may have conveyed the vehicle/occupant information to the

dispatch that was entered into the daily logs and broadcast on the teletype. (8/13/04 HRT 101.) This was not new information as Douglas and Paula Leonard, the couple that made the report, testified to this information at trial at the request of the defense. (102 RT 6586-6604.)

The Court also heard testimony from Deputy Paul Beltz, who was dispatched to the murder scene when the crimes were discovered and was the Sheriff who advised dispatch about the suspect vehicle and the "three young males." (8/25/04 ***970** HRT.) Deputy Beltz credibly testified that he could not recall the source of the suspect vehicle and the description of the three young males. (8/25/04 HRT 24-25.) He stated that it may have been information that he heard on the Sheriff radio or from Robert Howey, the neighbor of the Ryen family that made the initial call to the Sheriffs to report the murders. (8/25/04 HRT 24-25.)

Petitioner was aware of the daily logs at trial because they were provided to him during discovery via a subpoena duces tecum. Additionally, the defense elicited the testimony from Douglas and Paula Leonard at trial. (102 RT 6586, 6599.) The daily logs, therefore, cannot be a basis for an actual innocence claim. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489.

4. T-shirt (Trial Exhibit 169)

Petitioner alleges his innocence is shown by the T-shirt discovered less than one half mile[40] from the Ryen home near the Canyon Corral Bar. (Pet. at 19.) Moreover, there is nothing inconsistent with Petitioner's guilt and the T-shirt being left on the side of the road by the bar, inasmuch as Petitioner stole the Ryens' station wagon and would have driven past the Canyon Corral Bar on his way to Long Beach where he abandoned the station wagon. (Answer, Ex. 15.) Petitioner could have tossed the T-shirt out of the window of the Ryen station wagon, just as he tossed the hatchet out the window. (89 RT 3519; 90 RT 3791.) The cigarettes from inside the vehicle contained Petitioner's DNA. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) Also, since the T-shirt was introduced into evidence at trial by Petitioner in an effort to direct suspicion at the three bar patrons at the Canyon Corral Bar, it does not constitute evidence of actual innocence. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489.

Petitioner also attempts to connect the T-shirt on the side of the road by the bar to Lee Furrow, but Petitioner's DNA was on the T-shirt with the blood of the victims, linking Petitioner to the crime. *(See* Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) The stories told by Ms. Roper, now deceased, do not establish that Petitioner is

---

[40] In fact, the distance between the Ryen home and the Canyon Corral Bar driving along the only paved road leaving the Ryen home is 1.75 miles. (Answer, Ex. 17; Answer, Ex. 16(map).)

innocent. (Answer, Ex. 51.) Ms. Roper's allegations lack credibility. She was on drugs and hallucinating the night she claims she saw Furrow, and Furrow was at a rock concert on the night of the murders. (Answer, Exs. 45 at 1; 54 at 1.)

Petitioner also points out that no one identified the T-shirt as having come from the Ryen home, and the owners of the hideout house did not recognize the T-shirt. (Pet. at 20.) Since all of the occupants of the Ryen home except for eight-year-old Josh were dead, the failure to identify the T-shirt as coming from the Ryen home certainly does not exclude the possibility that it did. Also, the owners of the hideout house made it clear that items of clothing were kept at the house for various uses around the ranch. (87 RT 2991, 3044, 3065.) Petitioner admitted taking clothing from the hideout house. (97 RT 5410-12.) Given the presence of both Petitioner's blood and the victims' blood, and that the T-shirt was on the side of the road leading from the Ryen house to the ***971** freeway, it is entirely possible Petitioner used the T-shirt following the murders. In any event, what Petitioner claims was known at trial, and cannot serve as a basis for a claim of actual innocence. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489.

To put Petitioner's innocence claim in perspective, the primary newly discovered evidence pertaining to the T-shirt is that it is stained with Petitioner's blood. (Answer, Ex. 88.) Petitioner's claim that blood was planted on the T-shirt ignores that the T-shirt was never used as evidence against him. Moreover, the San Diego County Superior

Court made express findings in a recent post-conviction evidentiary hearing rejecting Petitioner's evidence tampering claims, (Answer, Ex. 9 at 10), and Petitioner fails to present clear and convincing evidence to rebut the presumption of correctness that attaches to those findings. 28 U.S.C. § 2254(e). Notwithstanding, EDTA preservative testing ordered by this Court fails to show any evidence tampering relating to Petitioner's blood found on the T-shirt.

5. Shoe Evidence

Investigators discovered three shoe-print impressions that the prosecution argued linked Petitioner to the murders: a partial sole impression on a spa cover outside the Ryen master bedroom, (88 RT 3363), a bloody shoe print on a bed sheet in the master bedroom, (89 RT 3506-07), and a shoe-print impression in the hideout house. (87 RT 2925.) All three appeared to come from tennis shoes, specifically the Pro-Keds Dude tennis shoes. (88 RT 3364-65; 94 RT 4764; 4778.)

Petitioner seeks to undermine the shoe-print evidence presented at trial. Petitioner begins by insinuating there is a problem with the bloody shoe print recovered from the sheet in the Ryen master bedroom because Deputy Duffy testified initially that he did not see any shoe impressions in the master bedroom, but later testified to seeing and photographing such an impression. (Pet. at 21.) Duffy testified to this at trial. (89 RT 3457-58, 3497, 3505, 3506.) Petitioner's insinuation was also rejected by his own expert at trial, Dr. Thornton.

(105 RT 7560 ("no particular quarrel concerning the collection and preservation of' the shoe print in blood).) Petitioner may not make a showing of actual innocence based on what was known at the time of trial and presented to the jury. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489.

Petitioner claims that the prosecution withheld information concerning criminalist William Baird's heroin use undermining his conclusion that the tread patterns on the shoeprints matched the tread patterns of the Pro-Keds Dude tennis shoes. Petitioner's claim concerning criminalist William Baird was previously adjudicated by this Court, *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 69-71. Therefore, his claim regarding Baird is barred. *See* 28 U.S.C. § 2244(b)(1). Additionally, at trial, Dewey Newberry, general merchandise manager of Stride Rite, viewed the photographs of the three shoe impressions from the Ryen home and the hideout house and concluded that the shoe impressions were from the Pro-Keds Dude tennis shoes. (86 RT 2642.)

The Court set an evidentiary hearing to address Petitioner's claim that the tennis shoes used at CIM Chino were common tennis shoes available to the general public through any number of retail and department stores such as Sears. (Pet. at 21-22.) The Court heard from Midge Carroll; Lt. Donald Smith, a former ***972** investigator at CIM under Midge Carroll; Don P. Luck, a former executive and sales manager for the Stride Rite Corporation, the company that manufactured the Pro-Keds Dude tennis shoes; Sandra Coke, the defense investigator

that obtained the declarations from Midge Carroll; James Taylor; and Detective Derek Pacifico of the San Bernardino Sheriff's Department.

a. Testimony of Former Warden Midge Carroll

Petitioner alleges that the prosecution failed to provide information to the defense from the former warden of CIM, Midge Carroll, that the prison-issued Pro-Keds Dude tennis shoes that matched the shoe prints from the crime scene were "common tennis shoes available to the general public through Sears and Roebuck and other such retail stores." *Cooper*, 358 F.3d at 1121. The Court finds no material *Brady* violation. Midge Carroll was known to the defense at the time of trial. There are phone messages from her to defense counsel and notes about securing her testimony in the defense file. (Answer, Ex. 81.) Moreover, in December of 2001, Ms. Carroll permitted Petitioner's defense investigator Paul Ingels to spend a week with her going through her papers. This was two-and-a-half years before she submitted her eleventh-hour declaration to the Ninth Circuit. (6/02/04 HRT 125 (Carroll's testimony); 8/13/04 HRT (Ingels' testimony).) Ms. Carroll even gave a telephonic interview to defense investigator Ingels back in November of 2001. (8/13/04 HRT (Ingels' testimony).)

Ms. Carroll testified at the evidentiary hearing that after reading a newspaper article stating that shoe prints found at the Ryen/Hughes murder scene were from a prison made tennis shoe, she commenced an informal inquiry into whether CIM

manufactured any special tennis shoes. (6/2/04 HRT 102-06.) In a telephonic interview by Detective Pacifico in 2004, Ms. Carroll explained what alerted her to conduct an inquiry was a newspaper article she read describing the tennis shoes as prison made. (Answer, Ex. 64 at 11.) Ms. Carroll indicated that she did not personally conduct an investigation but rather she "asked her staff to look into this special shoe and get back to me." (6/2/04 HRT 102.) These people may have included the CIM business manager, Hal Panner, associate warden Bob Bales, or her executive assistant Regina Stevens. (6/2/04 HRT 103.) Robert Bales was the Associate Warden at CIM, in charge of the minimum facility at the time of Petitioner's escape. Mr. Bales states he was never personally asked to check on any information regarding inmate shoes nor does he recall any conversations with Ms. Carroll about shoes, and no records regarding shoes were exchanged between Mr. Bales and Ms. Carroll. (Answer, Ex. 78 at 1.)

Following their investigation, Ms. Carroll's staff reported to her that the tennis shoes available at CIM were not prison-manufactured or specially manufactured tennis shoes but were commonly available at retail stores such as Sears. They allegedly told her CIM had bought the shoes at Sears, but this was incorrect. (6/2/04 HRT 102-06.) The contracts from Stride Rite for the CIM purchase of 1,390 Pro-Keds Dude shoes were admitted into evidence at trial. (Trial.Exs.84-88.) At the evidentiary hearing, Ms. Carroll testified that she had no personal knowledge as to the availability of Pro-Keds Dude tennis shoes at CIM:

Ms. Wilkens: So you have no personal knowledge whatsoever about the availability of the tennis shoes at CIM. *973 You only know what you heard from your staff.

Ms. Carroll: That is correct.

(6/2/04 HRT 158.)

Ms. Carroll failed to request the relevant purchasing records which were readily available or contact the investigators assigned at CIM for any assistance. She did not review the relevant contracts related to the tennis shoes purchases and only informally asked her staff what was going on with the tennis shoes. (6/2/04 HRT 154.) Her investigative staff worked closely and directly with the SBSD in assisting to provide information about Petitioner. (6/2/04 HRT 154.) Ms. Carroll, without conducting her own direct investigation, relied on incorrect information given to her by her staff. Ms. Carroll was relying on her own incorrect assumptions when she allegedly called to inform law enforcement about the CIM tennis shoes.[41] She had erroneously concluded that: (1) CIM did not purchase the Pro-

---

[41] The Court notes that Petitioner's investigator contacted Ms. Carroll back in November of 2001 and received copies of documents from her personal files in December of 2001. (*See* 6/02/04 HRT 125(Carroll's testimony); 8/13/04 HRT 132-33 (defense investigator Paul Ingels' testimony).) In 2001, Ms. Carroll told the investigator her belief that the tennis shoes were not specific to CIM but available at other locations. (8/13/04 HRT 132.) It is therefore curious that Carroll's declaration submitted to the Ninth Circuit is dated January 30, 2004.

Keds Dude tennis shoes directly from the manufacturer, and (2) the particular brand of shoes was readily available at retailers in southern California such as Sears. Evidence supporting a claim of innocence must be reliable evidence. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489.

Following Petitioner's escape from CIM, Ms. Carroll meticulously began keeping detailed records regarding Petitioner. (6/2/04 HRT 141.) She kept everything, including memos. (6/2/04 HRT 142.) Ms. Carroll testified that, after Petitioner's escape and the murders, she contacted the San Bernardino Sheriff's Department and told them that the shoes given to the inmates at CIM were not manufactured or specially made for the prisons but that they were commonly available to the public through major retailers such as Sears. (6/2/04 HRT 104-06.) Despite her detailed record keeping from this time period, Ms. Carroll did not keep a record of having contacted the Sheriff's office. (6/2/04 HRT 161.)

Ms. Carroll's records from that time period are currently in eight three-ring binder notebooks. (NOL filed 4/15/05, CIM Vault Notebooks.) The Court has reviewed the eight notebooks consisting of 2,484 pages of documents concerning Petitioner's escape, changes to security at CIM, newspaper articles, letters to the warden including a copy of the envelope, memoranda, receipts of mail sent, notes regarding phone calls noting date, time and person contacted, phone messages and many other documents concerning anything related to Petitioner. (NOL filed 4/15/05, CIM Vault

Notebooks.) Contrary to her testimony, records of telephone conversations were made and retained. *(See* NOL filed 4/15/05, CIM Vault Notebooks.) Yet, a memo or notation that a phone call made to a lead investigator with the SBSD is not documented, but an interview with the defense investigator with a witness called by the defense from CIM about the shoes is well documented. *(See* NOL filed 4/15/05, CIM Vault, Notebook 6 at 1409-17.) Ms. Carroll thought the information ***974** was significant enough to conduct a personal inquiry into the matter, but no documentation is noted despite voluminous notes related to Petitioner. In addition, Detective Pacifico conducted a search of the file for any documents concerning a phone call by Ms. Carroll but nothing was found. *(See* 6/3/04 RT 46-47.)

Carroll's multiple hearsay information contradicts the records maintained by her own institution, and the information known to persons with whom she purports to have spoken. The evidence at trial that contradicts Carroll's multiple hearsay has been confirmed by an Don Luck, former executive of Stride Rite Corporation with forty-two years of experience with the sale of the Pro-Keds shoe brand.

b. Testimony of Stride Rite employees Dewey Newberry and Don Luck

At trial, Stride Rite general merchandise manager for the Pro Keds division, Dewey Newberry, testified that CIM had a contract with Stride Rite, and had shipped the Pro-Keds Dude shoes to CIM in 1982 and 1983. (86 RT 2613, 2619.) He explained

that Stride Rite kept records of the orders placed by its clients including the quantity, color, and size of a particular shoe that is sold to a client. (86 RT 2619-20.) To Newberry's knowledge, the Pro-Keds Dude shoe was not sold anywhere in California, or elsewhere in the United States on a retail basis. (86 RT 2621, 2624.) Newberry was specifically asked if Stride Rite shipped any of the Dude model tennis shoes to J.C. Penney, Montgomery Ward, Fedco, or Target, and he indicated they did not. (86 RT at 2621.) He was asked if it would be a fair statement that the only place the shoes would have arrived in California is at some type of state facility, and he agreed that would be the case. (86 RT 2622.) He authenticated the sales records showing CIM purchased 1,390 pairs of Pro-Keds Dude tennis shoes in 1982.(86 RT 2623; Answer, Ex. 70.)

To the best of Newberry's knowledge, the complete list of invoices of all other institutions in and outside of California to which Pro-Keds Dude shoes were shipped from 1982 to 1983, were introduced into evidence. (86 RT 2623-24; Trial Exs. 84-88.) Those invoices reflect sales to the Naval Training Center, (Answer, Ex. 71) and numerous juvenile and correctional facilities and state hospitals. (Answer, Exs.71-74.)

The Court heard testimony of Don P. Luck at the evidentiary hearing. Mr. Luck is a former executive with the Stride Rite Corporation with forty-two years of experience selling and managing Pro-Keds and familiar with all sales of the Pro-Keds shoes to major retailers. (6/2/04 HRT 223.) Mr. Luck testified that he knew of all the major sales of Keds during

the 1980's and that he was personally responsible for the Sears, J.C. Penney's, and military exchange accounts. (6/2/04 HRT 224, 225, 229-32.) He testified that he is positive that there were no sales of the Pro-Keds Dude tennis shoes to Sears or any other large retail companies or chain stores in the western United States. (6/02/04 HRT 225, 231-32, 239-40.) At the hearing, Mr. Luck testified that he has reviewed the trial testimony of Newberry and the records admitted into evidence at trial, and confirms that such testimony and records are consistent with his recollection regarding the sales of Pro-Keds Dude tennis shoes. (6/02/04 HRT 224; Answer, Ex. 66 at 1.) Mr. Luck stated that Mr. Newberry was a thorough person with regards to reviewing and checking files. (6/02/04 HRT 232, 233.)

***975** Rather, the Pro-Keds Dude tennis shoe was a "bid" shoe, the low-end shoe of a particular brand, sold to institutions, such as prisons like CIM. (6/2/04 HRT 226-27.) Mr. Luck also stated he knows that the Dude shoe was not available to the public through any major retailer. (6/2/04 HRT 232.)

Mr. Luck could not rule out from his own personal knowledge sales to small shoe stores because the Pro-Keds Dude shoe was included in the wholesale shoe catalogue and because such sales would not have crossed his desk or been brought to his attention. (6/2/04 HRT 241.) But as Mr. Luck confirmed in his testimony, Mr. Newberry was the person who reviewed the Stride Rite corporate records and testified at trial based on his search of the records that there were no retail sales of the Pro-Keds Dude tennis shoes. (6/2/04 HRT 230, 233, 242.)

Mr. Luck did not comment nor dispute the contents of the corporate records or Mr. Newberry's testimony because he did not review those records at the time Mr. Newberry prepared to testify in Petitioner's state court trial. (6/2/04 HRT 230, 233, 242.) So while Mr. Luck cannot rule out sales to small shoe stores from his personal knowledge, nothing in his testimony cast any doubt upon Mr. Newberry's testimony or the corporation records admitted into evidence at Petitioner's trial. (6/2/04 HRT 233, 242, 251.) Mr. Luck stated that Stride Rite kept very complete records and there would be records of sales made to smaller retailers. (6/2/04 HRT 232, 242.)

The Court notes that at trial, Petitioner was aware that the Dude shoes were in the Pro-Keds wholesale catalogue. (86 RT 2638.) Newberry testified that the Dude shoes were in the catalogues for the past fifteen years before Petitioner escaped from CIM. (86 RT 2638.) It is not new information that the Dude tennis shoes were available in the company's wholesale catalogue. In addition, Newberry testified that Don Luck, who worked in the national accounts department for sales would be most knowledgeable about the contracts with the State of California for the Pro-Keds Dude tennis shoes. (86 RT 2640-41.) Information regarding the presence of the Pro-Keds Dude tennis shoes in the wholesale catalogue was presented at trial and available to defense counsel to investigate.

Mr. Luck also placed into perspective the number of the Pro-Keds Dude tennis shoes manufactured by Stride Rite in 1982 in comparison to other retailers of canvas basketball shoes. (6/2/04 HRT 247, 254-55.)

He estimated that Stride Rite sold approximately 80,000 of the Dude tennis shoes, (6/2/04 HRT 247) while its competitor Converse was selling thirty million pairs of the Champion Oxford and eighty million pairs of the loose-lined tennis shoes in 1982.(6/2/04 HRT 253-54.)

Although the former warden erroneously believed the Pro-Keds Dude tennis shoes were locally available to the public though major retailers such as Sears, credible testimony by Stride Rite employees Mr. Newberry, at trial, and Mr. Luck, at the evidentiary hearing, establish that Pro-Keds Dude tennis shoes were not sold to Sears or any comparable retail store in the West coast. Moreover, CIM and Stride Rite Corporation records establish that CIM had a purchase contract with Stride Rite Corporation, the manufacturer of Pro-Keds Dude tennis shoes, for the Dude tennis shoes at the relevant time period. In addition, Stride Rite kept accurate records of all its sales and the contracts provided at trial showed that Pro-Keds Dude tennis shoes were not sold to retailers in California but sold primarily to ***976** state institutions including the sale of 1,390 pairs of Pro-Keds Dude tennis shoes to CIM where Petitioner was incarcerated.

c. Testimony of Lieutenant Donald Smith

At the evidentiary hearing, the Court also heard from Lieutenant Donald Smith, the officer in charge of Investigative Services for CIM. (6/2/04 HRT 211.) At the hearing, he verified his statements and testimony from pre-trial motions and the trial, that he obtained copies of the purchase contracts between

CIM and the Keds Corporation, and provided those to the prosecution. (6/02/04 HRT 212; *see* 22 PRT 108-109; 85 RT 2487 (Trial Exs. 16, 17); Answer, Ex. 69.) Lt. Smith also testified at the evidentiary hearing that he has no recollection of being asked to investigate the source of the prison tennis shoes. (6/2/04 HRT 212.) Lt. Smith also testified the prisoners frequently played basketball and that they organized their own teams. (6/2/04 HRT 219, 221-22.)

d. Testimony of Detective Pacifico

In order to determine if any records exist at the San Bernardino Sheriff's Department regarding the alleged phone call from Ms. Carroll regarding the CIM tennis shoes, Detective Derrick Pacifico testified at the evidentiary hearing on June 3, 2004. Detective Pacifico testified that he looked through all of the files at the San Bernardino Sheriff's Office and that he could not find any indication of a contact from Ms. Carroll. (6/3/04 HRT 46-47.)

e. Testimony of Inmate James Taylor

Petitioner's next effort to challenge the shoe-print evidence rests on the alleged recantation of inmate James Taylor's trial testimony. (Pet. at 21.) Mr. Taylor testified at trial that he gave Petitioner a pair of Pro-Keds that Petitioner never returned. (85 RT 2511, 2546.) Mr. Taylor signed an eleventh-hour declaration penned by a defense investigator, who destroyed her notes of the interview. (6/02/04 HRT 11-12.) The declaration stated the only shoes he ever

gave Petitioner were P.F. Flyers, not Pro-Keds. *Cooper*, 358 F.3d at 1121.

i. Preliminary Hearing Testimony

On November 15, 1983, at the preliminary hearing, Taylor testified for the prosecution that he was housed at Reception Center West at CIM. (4 PRT 3, 4.) Taylor was responsible for checking in and out all inmate recreational activity equipment. (4 PRT 5, 6.) Petitioner came into the gym in the R.C. West facility in May of 1983. (4 PRT 4.) Before Petitioner was transferred from the medium-security facility at CIM to a minimum-security facility, Mr. Taylor issued Petitioner a pair of state-issued tennis shoes. (4 PRT 5.) The shoes were black Pro-Keds. (4 PRT 5.) Mr. Taylor never got the pair of Pro-Keds tennis shoes back from Petitioner. (4 PRT 6.)

ii. Trial Testimony

At trial, Mr. Taylor again testified for the prosecution. (85 RT 2500.) In May of 1983, Mr. Taylor worked as a recreational instructor at the R.C. West facility at CIM. (85 RT 2500-01.) He handed out equipment, including tennis shoes. The shoes they stocked included Pro-Keds, P.F. Flyers, and assorted Converse tennis shoes. (85 RT 2501-02.) Mr. Taylor identified the Pro-Keds tennis shoes (Trial Ex. 38) and the tennis-shoe box (Trial Ex. 51) as the Pro-Keds that were available for checkout to inmates at the gym in May 1983.(85 RT 2503.)

***977** Mr. Taylor knew Petitioner by the name of David Trautman. (85 RT 2504.) At first, Mr. Taylor

issued Petitioner a pair of P.F. Flyers. Three or four days before Petitioner left for minimum security, Mr. Taylor gave Petitioner a pair of black Pro-Keds. (85 RT 2510, 2547.) Mr. Taylor gave Petitioner the shoes sometime in the month of May after the tenth of the month. (85 RT 2546.) He gave Petitioner the P.F. Flyers and then the Pro-Keds on the same day. (85 RT 2546.) Mr. Taylor could not recall the size of the shoes. (85 RT 2511, 2552.) He never got the Pro-Keds shoes back from Petitioner. (85 RT 2511.)

On cross-examination, Mr. Taylor was asked why he did not mention giving Petitioner a pair of P.F. Flyers when he testified at the preliminary hearing. Mr. Taylor explained that "it wasn't the shoe in question." (85 RT 2545.) Mr. Taylor testified the gym had four brands of tennis shoes: Nike, Converse, Pro-Keds, and P.F. Flyers. Mr. Taylor did not have a key to the room with the shoes, and always went into the room with a correctional officer present. (85 RT 2551.) The shoes Mr. Taylor gave to Petitioner were not in a box and Mr. Taylor did not know the condition of the shoe. (85 RT 2552.)

Mr. Taylor did not recall making a statement to CIM Investigator Hernandez that somehow Petitioner had gotten some Pro-Keds. (85 RT 2555.) A tape recording was played to the jury of Mr. Taylor's interview with CIM Investigator Hernandez. In the interview, Mr. Taylor said that Petitioner had a pair of brown Brogan prison issue shoes, and no tennis shoes. (85 RT 2569.) The first pair he gave him was a pair of P.F. Flyers, and then somehow Petitioner came up with a pair of Pro-Keds. (85 RT 2570.) Mr. Taylor then said he gave

Petitioner two pairs of shoes, and he traded him for Pro-Keds when he got the right size. (85 RT 2570.)

iii. Evidentiary Hearing Testimony

On June 2, 2004, Mr. Taylor testified at an evidentiary hearing. Mr. Taylor began by explaining that in 1983 he could identify the difference between P.F. Flyer basketball shoes and Pro-Keds basketball shoes. (6/02/04 HRT 2, 3.) He also correctly identified pictures of both a Pro-Keds Dude and a P.F. Flyer tennis shoe. (6/02/04 HRT 5, 6; Resp. Evidentiary Hr'g Ex. CC, photo 1 (P.F. Flyer) and photos 2 and 3(Pro-Keds).) He further identified the Dude tennis shoe as being a black canvas shoe with the words Pro-Keds on the back of the shoe. (6/02/04 HRT 4; Resp. Evidentiary Hr'g Ex. CC, photo 1 (P.F. Flyer) and photos 2 and 3 (Pro-Keds)).

He explained that the P.F. Flyer is an everyday tennis shoe and that the Pro-Keds Dude is a better-made shoe that he would give to the basketball players. (6/02/04 HRT 3-6.) This is consistent with Lt. Smith's testimony that the prisoners would organize unofficial basketball teams. (6/02/04 HRT 221-22.) He gave Petitioner a pair of Pro-Keds. (6/02/04 HRT 43.) Mr. Taylor could not recall at the hearing whether he had given Petitioner a pair of P.F. Flyers prior to exchanging them for Pro-Keds Dude tennis shoes. (6/02/04 HRT 36, 41, 42.) He did verify his trial testimony as truthful, however, and stated that he was sure he had given Petitioner a pair of Pro-Keds Dude tennis shoes. (6/02/04 HRT 6.)

During the interview with investigator Coke, Mr. Taylor stated many times that he gave Petitioner Pro-Keds Dude tennis shoes. (6/02/04 HRT 12.) He told investigator Coke that he had told the truth already at trial and that there was nothing ***978** to expound upon. (6/02/04 *Id.* at 12.) Mr. Taylor explained that he was confused by his conversation with investigator Coke. (6/02/04 HRT 13, 26, 60, 61.) He explained that the Pro-Keds tennis shoes he gave to Petitioner and that he identified in the pictures at the hearing (6/02/04 hearing, Resp't's Ex. CC, photos nos. 2 and 3 of the Pro-Keds) were sometimes called "Pro Keds" or "P.F. Flyer Pro Keds." (*Id.* at 13, 14.)

Mr. Taylor explained that the declaration did not reflect what he was attempting to convey, that he gave Petitioner a pair of Pro-Keds that were not returned. (6/02/04 at 67-69.) Taylor was unequivocal at the hearing that he gave Petitioner Pro-Keds:

Ms. Wilkens: Mr. Taylor, sitting here today, do you have any doubt whatsoever that the brand of shoes you provided to Kevin Cooper prior to his escape from CIM that were not returned to you were Pro Ked (sic) tennis shoes?

Mr. Taylor: I have no doubt that they were Pro-Ked (sic), and these are the models-middle and bottom on-whatever page you want to call that.

Ms. Wilkens: So Exhibit CC that's in front of you now.

Mr. Taylor. Yes.

(6/02/04 at 21, 22.)

Mr. Taylor's credible testimony at the evidentiary hearing corroborates his trial testimony that he gave Petitioner a pair of Pro-Keds Dude tennis shoes, which Mr. Taylor correctly identified by sight, and that Petitioner never returned those shoes. Mr. Taylor was simply confused by his interview with investigator Coke, who destroyed her notes of the interview. He believed that his recent declaration reflected that he gave Petitioner the Pro-Keds Dude tennis shoes. He also correctly identified pictures of the Pro-Keds Dude tennis shoes as the type of shoes that he gave to Petitioner. Therefore, the Court concludes therefore that there was no recantation by Mr. Taylor and that Petitioner had a pair of Pro-Keds Dude tennis shoes when he escaped from CIM.

f. Correctional Officer Mason's Testimony at Trial

Correctional Officer Sydney Mason testified at trial that he recalled issuing Pro-Keds Dude shoes in either size 9 or 10 to an inmate who resembled Petitioner.[42] (104 RT 7176-78.) Officer Mason said he did not know whether the shoes were new or used but assumed they were new because they were in a box with a lid. (104 RT 7180-81.)

---

[42] The defense interviewed another prisoner before trial who also confirmed that Petitioner had a pair of Pro-Keds Dude tennis shoes. (Answer, Ex. 61.)

Based on the testimony at the evidentiary hearing and review of the trial and preliminary hearing transcripts, Petitioner has failed to demonstrate a showing of actual innocence. The Ninth Circuit was concerned that the particular type of shoe was not even available at CIM and thus Petitioner could not have been responsible for making the evidence shoe prints in his prison-issued shoes. *See Cooper*, 358 F.3d at 1122. This is not the case as the contracts showing the CIM purchase of the Pro-Keds Dude shoes were admitted into evidence at the trial. Former Warden Carroll was mistaken about the source of the shoes issued at CIM and their availability in retail stores. The corporate records admitted into evidence at trial confirm the sales of the shoes were to the Naval Training Center, U.S. Forestry Service, ***979** and numerous juvenile and correctional facilities and state hospitals. (Trial Exs. 84-88; Answer, Exs. 69-75.) At trial, it was known that the Pro-Keds Dude tennis shoes were not limited to prison inmates. It was also know that the Pro-Keds Dude tennis shoes were featured in Pro-Keds' wholesale catalogue. (86 RT 2638.) There is no evidence that retail sales of the Pro-Keds Dude tennis shoes were made in California.

In addition, Ms. Carroll was known to the defense at the time of trial. There are phone messages from her to defense counsel and notes about securing her testimony in the defense file. (Answer, Ex. 81.) A note in the CIM vault notebook references a call made to Petitioner's defense investigator on

December 17, 1984.[43] (NOL filed 4/15/05, CIM Vault, Notebook 6 at 1408.) In fact, Mr. Forbush conducted an interview of Sydney Mason at CIM regarding the tennis shoes on December 15, 1984.(NOL filed 4/15/05, CIM Vault, Notebook 6 at 1409.) Moreover, in November of 2001, defense investigator Paul Ingels contacted Ms. Carroll by telephone and she told him her belief about the tennis shoes. (8/13/04 HRT 132.) In December of 2001, Ms. Carroll permitted investigator Ingels to spend a week with her going through her papers. This was over two-and-a-half years before her eleventh-hour declaration was presented to the Ninth Circuit. (6/2/04 HRT 125 (Carroll's testimony); 8/13/04 HRT 133 (Ingels' testimony).) She was available to the defense. In addition, at the time of trial, she was freely available to the defense to freely discuss any issue.

According to Stride Rite executives, Pro-Keds Dude tennis shoes were sold primarily to state institutions. The purchasing records show that CIM purchased the Dude tennis shoes from Stride Rite at the relevant time period. The testimony of Mr. Newberry and Mr. Luck demonstrate that Pro-Keds

---

[43] The only newspaper article in the CIM vault notebooks concerning the prison shoes is an article dated December 12, 1984.(*See* CIM Vault, Notebook 8 at 1738-A.) A few days later, on December 15, 1984, defense investigator Forbush was at CIM conducting an interview of Officer Mason regarding the shoe issue. This shows that the defense had access to CIM to investigate the shoe issue and had cooperation from CIM officials, including Midge Carroll, who was available to the defense during the time when she had read about the prison shoes.

Dude tennis shoes were not sold retail in California. Carroll's unreliable hearsay is not material inculpatory evidence and does not violate Brady. Under the totality of the evidence, the Court concludes that there was no material *Brady* violation. (Answer, Ex. 81.)

Even if the shoe had been sold retail to a few stores on the East coast, it would not change the inculpatory nature of the shoeprint evidence. Defense counsel argued, consistent with the corporate records in evidence, that the Pro-Keds were not available just to prisoners, but were available to the Navy, the Forestry Department, and all kinds of different people besides prisoners. (Answer, Ex. 71-74.) Accordingly, it was never assumed that the distribution of the shoes was limited to prison inmates; what mattered was that the shoes were linked to Petitioner.

Petitioner escaped from CIM, which clearly had the Pro-Keds Dude tennis shoe for its inmates, as established by the purchase contracts. Moreover, Mr. Taylor credibly testified that he gave Petitioner a pair of the Pro-Keds Dude shoes and that ***980** Petitioner never returned them prior to his escape from CIM. These facts, combined with the consistency between the shoe print from the hideout house where Petitioner was sleeping with both the shoe print outside the Ryen master bedroom sliding glass door and the one on the sheet from the Ryens' bed, are what made the shoe-print evidence incriminating.

Finally, statements by the prosecution in opening and closing argument about the availability of the Pro-Keds Dude tennis shoes were not material or prejudicial. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The prosecutor based his comments on the testimony at trial. Based on testimony of Mr. Taylor and Officer Mason, Petitioner was in receipt of the Pro-Keds Dude tennis shoes at CIM and the shoeprints from these shoes were found inside the hideout house and Ryen home. In addition, there was a myriad of evidence connecting Petitioner to the murders. Therefore, even if there were a misstatement, the prosecutor's statement was not material such that the results of the proceeding would have been different. *See Brady*, 373 U.S. at 83, 83 S.Ct. 1194. Additionally, the California Supreme Court denied Petitioner's *Brady* claim on the merits. (Answer, Ex. 13.) Accordingly, the Court concludes Petitioner has failed to show a material *Brady* violation regarding the Pro-Keds Dude tennis shoes.

6. Petitioner's Lack of Credibility

[23] Petitioner argues that his innocence is evident because he had no motive to kill the Ryens and Chris Hughes. (Pet. at 22.) Petitioner previously made this argument to the jury at trial, and the jury rejected his testimony. (106 RT 7796-97.) Petitioner's admission of facts says nothing about his credibility considering the evidence connecting Petitioner to the murders. Before Petitioner admitted his presence at the hideout house, he already knew that his fingerprint was on a jar in the kitchen, his semen was in the closet, and he had made phone calls to old

girlfriends from the hideout house shortly before the massacre. Petitioner's trial testimony cannot serve to support a showing of actual innocence, both because it is not newly discovered, 28 U.S.C. § 2244(b), and because it does not rebut by clear and convincing evidence the express factual findings of the California Supreme Court which are entitled to a presumption of correctness. *See* 28 U.S.C. § 2254(e).

7. Josh Ryen's statements

Petitioner next contends that Josh Ryen gave a description of the assailants that exonerates him, (Pet. at 23), but this evidence was already admitted at trial. (95 RT 4932-70; 4971-73.) The jury already rejected Petitioner's claim of innocence based on the speculation of an eight-year-old child, made shortly after he was brutally attacked, that the three Hispanic males who came to his home looking for work before the family left for the barbeque were responsible for the murders in his home later that night. (95 RT 4932-70; 4971-73.) The post-conviction testing of the physical evidence at the crime confirms Petitioner's guilt. Evidence exhibit A-41, the blood from the crime scene discovered shortly after the discovery of the victims, is consistent with blood from an African American and inconsistent with a Hispanic or White individual. (93 RT 4424.) Moreover, the post-conviction DNA testing confirms that A-41 is Petitioner's blood. *(See* Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) Continued exploitation of the speculation of *981 victim who had been through a horrific experience is not a reliable basis for a finding of actual innocence. *See Schlup*, 513 U.S. at 324, 115

S.Ct. 851; Thompson, 523 U.S. at 559, 118 S.Ct. 1489.

8. Multiple assailants

Petitioner also revives his argument at trial that the nature and number of the weapons, wounds, and victims confirms his innocence. (Pet. at 23.) The forensic evidence only inculpates Petitioner. There is nothing inconsistent with the forensic evidence and his guilt. As a result, Petitioner's attempts to revive his multiple-assailant argument from trial, (106 RT 7800-04), do not constitute evidence of actual innocence. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489.

9. Lee Furrow

Petitioner contends the jurors were deprived of a basis for finding reasonable doubt because the prosecution failed to provide the jury with information about the presence of blood on the coveralls, Mr. Furrow's background, and the destruction of the coveralls. (Pet. at 28.) Petitioner is confusing the burden of the prosecution at trial with his burden on habeas in establishing a claim of actual innocence. The jury was aware that the coveralls were destroyed. (102 RT 6545-55.) It is hardly surprising that defense counsel did not present the testimony of Diana Roper. Her credibility issues were readily apparent. (Answer, Ex. 53.) Moreover, the post-conviction DNA testing has confirmed Petitioner's guilt. *(See* Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.)

The stories about Mr. Furrow and coveralls, T-shirts, and hatchet originate with Diana Roper. Diana Roper, now deceased, was abusing drugs and had a motive for disparaging Furrow since he left her the night of the murders, and had begun a sexual relationship with her childhood friend, Debbie Glasgow. (Answer, Ex. 37 (Furrow Decl.).) Significantly, Furrow had an alibi for the night of the murders. He was seen at a concert that night in Glen Helen Park with Debbie Glasgow. It would have been a poor strategy to claim that they traveled from the concert in Glen Helen to Chino Hills, murdered the Ryens and Chris Hughes, and returned home to Mentone. *(See* Answer, (map); 37 (Furrow Decl.); 39(Darnell Decl.); 41 (Schepling Decl.); 47 (Curry Decl.).) In any event, Roper's statements about Furrow do not constitute reliable evidence that could support an actual innocence claim. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489.

a. Ineffective Assistance of Counsel with Regard to Lee Furrow

The Court also denies Petitioner's claim of ineffective assistance of counsel concerning whether trial counsel should have tried to link the coveralls to Lee Furrow. (Pet. at 61-64.) This Court defers to the California Supreme Court's decision denying Petitioner's claim on the merits pursuant to 28 U.S.C. § 2254(d). Petitioner's claim also does not satisfy the requirements of 28 U.S.C. § 2244(b).

i. Claim of Ineffective Assistance of Counsel With Regard to Lee Furrow is Denied on the Merits

Petitioner does not show that defense trial counsel's performance fell below the constitutional standard by failing to present evidence allegedly linking Furrow to the coveralls or other evidence at trial. In ***982** fact, defense trial counsel presented evidence of the destruction of a pair of coveralls allegedly linked to the Ryens/Hughes murders through law enforcement witnesses, (102 RT 6545-55), thereby allowing counsel to exploit the destruction of the coveralls without encountering the credibility problems that defense counsel knew would arise with presenting testimony from Diana Roper. The testimony of Karee Kellison Curry, Roper's sister, would encounter similar credibility problems for the defense in attempting to connect the coveralls to the Ryen/Hughes murders through Furrow. (Answer, Ex. 37 at 2.) Moreover, given the overwhelming evidence of Petitioner's guilt before the jury, Petitioner has not shown any prejudice.

As both the California Supreme Court and this Court have already expressly concluded, Petitioner "'received an extraordinarily vigorous and able defense.'" *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 8 (quoting *Cooper*, 53 Cal.3d at 824, 281 Cal.Rptr. 90, 809 P.2d 865). Defense trial counsel's extensive educational background and prior litigation experience were developed in the evidentiary hearing before this Court in *Cooper I*. *See Cooper I*, 92-CV427, Aug. 25, 1997 Order at 8.

Moreover, both this Court and the California Supreme Court found the evidence of Petitioner's guilt to be overwhelming. *Cooper I,* 92-CV-427, Aug. 25, 1997 Order at 8 (quoting *Cooper*, 53 Cal.3d at 836, 281 Cal.Rptr. 90, 809 P.2d 865). Accordingly, the California Supreme Court's decision rejecting the merits of Petitioner's claim is not contrary to federal law, nor an unreasonable determination of the facts, since defense counsel was not deficient, nor was Petitioner prejudiced by his attorney's strategic decisions. This Court therefore **DENIES** this claim pursuant to 28 U.S.C. § 2254(d).

ii. Petitioner Does Not Satisfy the Requirements of 28 U.S.C. § 2244(b)

If Petitioner has previously adjudicated a claim of ineffective assistance of counsel in this Court, his pending claim of ineffective assistance of counsel must be dismissed. 28 U.S.C. § 2244(b). New factual grounds in support of a legal claim that has already been presented are not sufficient to evade the mandatory dismissal requirement of 28 U.S.C. § 2244(b). *See Babbitt,* 177 F.3d at 746.

Petitioner already complained about his defense trial counsel's performance in a myriad of claims of ineffective assistance of trial counsel in his first habeas corpus petition, *Cooper I,* Supp'l Pet. at 63-147, all of which were denied on the merits by this Court. *Cooper I,* 92-CV-427, Aug. 25, 1997 Order at 7-33. The gravamen of the claim of ineffective assistance of trial counsel is the same, regardless of whether Petitioner presents new and different legal arguments or different factual allegations. *See*

Babbitt, 177 F.3d at 746. Petitioner made allegations about trial counsel's failure to utilize a second counsel, failure to conduct an adequate investigation, and to advocate in particular ways with respect to the evidence. *See Cooper I,* Supp'l Pet. at 121-41. The thrust of Petitioner's attack on his defense counsel's failure to present evidence connecting Mr. Furrow to the coveralls is the same as his other claims of ineffective assistance of counsel raised in his first petition. Thus, this Court **DENIES** the claim pursuant to 28 U.S.C. § 2244(b)(1).

Also, Petitioner could have presented the legal and factual basis of his claim previously with due diligence. 28 U.S.C. § 2244(b). The connection between Lee Furrow and Diana Roper has been known ***983** since the time of trial. (Answer, Ex. 53.) With due diligence this claim could have been presented in Petitioner's first federal habeas petition. Beyond the due diligence showing, Petitioner would be required to demonstrate that the facts underlying his claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him guilty of the Ryen/Hughes murders. *See* 28 U.S.C. § 2244(b). Petitioner does not meet this requirement. Petitioner's guilt was demonstrated by overwhelming evidence at trial, and has been reaffirmed through post-conviction DNA testing. Petitioner does not establish by clear and convincing evidence that no juror would have convicted Petitioner if presented information concerning Lee Furrow at trial.

10. Mental Patient Anthony Wisely's Alleged Report of the Kenneth Koon "Confession"

Petitioner contends that the multiple hearsay statements of a mental patient, Anthony Wisely, demonstrates his innocence and the unreliability of the jury's verdict. (Pet. at 28.) The statements that Petitioner attributes to Kenneth Koon consist of multiple hearsay related by mental patient Anthony Wisely. Petitioner attempts to tie the information attributed to Mr. Koon by the mental patient to Diana Roper. Koon met Roper after Furrow left her, and Koon later married her. Koon has denied any involvement in the Ryen/Hughes murders. (Answer, Exs. 37 (Furrow Decl.); 48 (Curry Decl.); 54(Koon Decl.).)

Considerably more than a mental patient's secondhand version of a confession by Koon is required to demonstrate actual innocence. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489. The post-conviction DNA testing confirms Petitioner's guilt and refutes Petitioner's allegations regarding Koon. Item A-41 is from an African American, (93 RT 4424); Koon is white. Petitioner's DNA is found on the cigarette butts in the Ryen station wagon. *(See* Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) Petitioner's blood and Doug Ryen's blood are on the T-shirt found near the crime scene. *(See* Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) The mitochondrial DNA testing and EDTA testing have not undermined the post-conviction DNA testing results confirming Petitioner's guilt. The Court previously considered

and adjudicated Petitioner's claims regarding mental patient Wisely's account, and the Court affirmed the ruling and denied a successive petition. *Cooper I*, 92-CV-427, Aug. 25, 1997 Order. This Court has further evaluated the allegations in light of all the evidence, and **DENIES** the claims on the merits.

a. Ineffective Assistance of Counsel Re Kenneth Koon is Denied on the Merits

Similarly, the Court denies any claims of ineffective assistance of counsel claim as did the California Supreme Court regarding Mr. Koon. (Pet. at 58-61.) This Court defers to the denial of the claim on the merits by the California Supreme Court pursuant to 28 U.S.C. § 2254(d) and also under 28 U.S.C. § 2244(b). (Answer, Ex. 3.) The state court's denial of Petitioner's claim on the merits is not contrary to federal law as enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and does ***984** not rest with an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d).

At trial, the link between Roper, Furrow, and Koon was noted in an in-chambers conference with counsel when defense counsel was provided with the report about mental patient, Wisely and Koon. (97 RT 5324-25.) Counsel was given time to review the new information to determine how to proceed. (97 RT 5325.) The main connection between Koon and Furrow is Diana Roper. Roper met Koon about a week after Furrow left her which was a week after

the murders, and she later married Koon. (Answer, Ex. 54 at 1.)

Defense trial counsel cannot be faulted for a strategic decision not to call Roper at trial. During the time of the murders, Roper was using methamphetamine on a daily basis and in the midst of breaking up with Furrow knowing he was having sexual relations with one of her childhood friends, Debbie Glasgow. (Answer, Ex. 53; Ex. 37.)

What Koon knew about Furrow was hearsay from Roper. (Answer, Ex. 54 at 2.) Such strategic decisions at trial to avoid having Roper, her friends, or Furrow's relatives testify concerning the coveralls, tennis shoes or Roper's relationship with Koon and Furrow are not grounds for a *Strickland* claim under these circumstances. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

Petitioner has failed to show that his counsel was deficient. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. As both the California Supreme Court and this Court have already expressly found, Petitioner "'received an extraordinarily vigorous and able defense.'" *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 8 (quoting *Cooper*, 53 Cal.3d at 824, 281 Cal.Rptr. 90, 809 P.2d 865). Moreover, both this Court and the California Supreme Court found the combination of evidence of Petitioner's guilt to be overwhelming. *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 8 (quoting *Cooper*, 53 Cal.3d at 836, 281 Cal.Rptr. 90, 809 P.2d 865). Defense counsel was not deficient and Petitioner was not prejudiced as the post-conviction DNA testing has confirmed Petitioner's guilt.

Accordingly, the California Supreme Court's decision rejecting the merits of Petitioner's claim is not contrary to federal law, nor an unreasonable determination of the facts. Therefore, the Court **DENIES** this claim pursuant to 28 U.S.C. § 2254(d).

b. Petitioner Does Not Satisfy the Requirement of 28 U.S.C. § 2244(b)

If Petitioner has previously adjudicated a claim of ineffective assistance of counsel in this Court, his pending claim of ineffective assistance of counsel must be dismissed. 28 U.S.C. § 2244(b). New factual grounds in support of the same legal claim which has already been presented are not sufficient to evade the mandatory dismissal requirement of § 2244(b). *See Babbitt,* 177 F.3d at 746. In prior habeas proceedings, the Ninth Circuit concluded the reference to the Koon confession in the second federal petition was not sufficient to raise a distinct claim of ineffective assistance of counsel on the Koon confession claim in the first federal petition. *Cooper*, 274 F.3d at 1274.

As the *Babbitt* case illustrates, because the gravamen of Petitioner's ineffective assistance of counsel claim was essentially the same as his earlier claims, new factual grounds such as those presented in the instant claim still pertain to defense counsel's investigation and presentation of ***985** Petitioner's defense and, therefore, do not constitute a different claim within the meaning of 28 U.S.C. § 2244(b)(1). In any event, the Ninth Circuit concluded that Petitioner could not meet the due diligence requirement and he was precluded from filing a

successive petition because of his inability to meet the requirements of 28 U.S.C. § 2244(b)(2). *Cooper*, 274 F.3d at 1275. It is axiomatic that Petitioner is not able to meet the due diligence requirement now when he was unable to do so in 2001. Accordingly, Petitioner's claim of ineffective assistance of counsel is **DENIED** under 28 U.S.C. § 2244.

E. Claim of Actual Innocence is Denied on the Merits

Petitioner's claim of actual innocence was heard and denied on the merits by the California Supreme Court. (Sixth State Habeas Pet. at 12-37; Answer, Ex. 13.) In rejecting the merits of Petitioner's sixth eleventh-hour state habeas petition, the California Supreme Court unanimously found the following:

> As with the previous five petitions for writ of habeas corpus that petitioner has filed in this court challenging the judgment, this petition casts no doubt on petitioner's guilt or the validity of the judgment.

(Answer, Ex. 13.)

The same express finding was reiterated with respect to the denial of Petitioner's seventh state habeas petition. (Answer, Ex. 14.) This Court defers to the California Supreme Court's decision because it is not contrary to federal law as enunciated by the United States Supreme Court, nor is it based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

F. Petitioner Does Not Meet the Requirements of 28 U.S.C. 2244(b), *Schlup*, or *Herrera*

In sum, Petitioner has had ample opportunity for review in both the state and federal courts, exploring every possible avenue of challenge to his conviction. All of these challenges have come back the same: there is overwhelming evidence that Petitioner is the person guilty of these murders. New evidence of innocence must be reliable evidence that was not presented at trial. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851; *Thompson*, 523 U.S. at 559, 118 S.Ct. 1489. Most of Petitioner's allegations relate to evidence that was already presented at trial and previously rejected. In addition, the remainder of his allegations rest on unreliable or incorrect information and sources.

After considering all of the evidence presented by Petitioner and the substantial record from the trial court, direct review, and collateral review, the Court concludes that Petitioner has not meet his burden under 28 U.S.C. 2244(b), which requires among other things, a "factual claim [ ] not discoverable through the exercise of due diligence" that establishes by "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Even if Petitioner has met the showing under 28 U.S.C. § 2244(b), the state court's decision is not contrary to or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d). Neither has Petitioner met his burden under Schlup, which requires Petitioner to

show that "in light of all the evidence, including new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." For the ***986** same reasons, the Court also concludes that Petitioner has not met the stringent burden of *Herrera*, which requires an "extraordinarily high" showing of "a truly persuasive demonstration of 'actual innocence.' "Further, Petitioner also fails to show that there is "no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417, 113 S.Ct. 853. The California Supreme Court denied Petitioner's actual innocence claim on the merits, (*see* Sixth State Habeas Pet. at 1237; Answer, Ex. 13), and the Governor of California denied his application for clemency. This Court **DENIES** Petitioner's claim as not presenting a cognizable federal habeas claim based upon an assertion of actual innocence under *Herrera*.

This Court therefore **DENIES** Petitioner's claims pursuant to 28 U.S.C. § 2244(b), and alternatively under *Schlup* and *Herrera* and on the merits pursuant to 28 U.S.C. § 2254.

V. Prosecution's Withholding of Evidence and Presenting False Testimony Regarding the Coveralls

Petitioner alleges that his constitutional rights were violated by the suppression of material exculpatory evidence and by the presentation of false testimony regarding the destruction of the coveralls by Deputy Frederick Eckley of the San Bernardino Sheriff's Office. (Pet. at 54-58.) Petitioner claims that

in December 1998, he discovered a disposition report where a "KS" had signed off on the destruction of the coveralls. From this, Petitioner alleges that Deputy Eckley did not act alone in destroying the coveralls, but did so deliberately in consultation with KS, a superior. (Pet. at 57.) Therefore, Petitioner contends that Deputy Eckley's testimony in pre-trial proceedings and at trial regarding the destruction of the coveralls falsely conveyed that he destroyed the coveralls on his own.

The Court conducted an evidentiary hearing and heard from Deputy Eckley and Deputy Ken Schreckengost, "KS" to address this claim. After considering their testimony and evaluating their credibility as witnesses, the Court **DENIES** Petitioner's claims.

A. Pretrial Hearing and Trial Testimony

On June 11, 1984, during the pretrial evidentiary hearing, Deputy Eckley testified he was dispatched to the home of Diane Roper in Mentone, California, which was located approximately forty miles from the Ryen home. Ms. Roper directed him to a closet where he found a pair of coveralls. Deputy Eckley testified that the coveralls were not heavily spotted but had stains below the knew that were dry and reddish in color, as opposed to the usually brownish color of dried bloodstains that he had seen in the past. (32 RT 3183-84, 3205, 3211.) Deputy Eckley also testified that the coveralls had hair, sweat, dirt, and manure on them. (32 RT 3183-84.)

Although Ms. Roper did not know who owned the coveralls, her father told Deputy Eckley that Ms. Roper felt that the coveralls had some importance to the Ryen case based on a "vision" she had experienced, as opposed to anything she had actually seen.[44] (32 RT 3204-05.) After ***987** Eckley took the coveralls to the Yucaipa substation and tagged them, he called the San Bernardino homicide department and left a message. Although the homicide department never returned his call about the coveralls, Deputy Eckley testified that he spoke with defense investigator Forbush about the coveralls. (32 RT 3205-06.) In December of 1983, after failing to receive a return call from homicide, and believing the coveralls "had no value to the case," Deputy Eckley destroyed the coveralls. (32 RT 3194.) Deputy Eckley similarly testified about the coveralls at trial. (102 RT 6545-55.)

B. Evidentiary Hearing Testimony of KS and Eckley

The Court held an evidentiary hearing on April 1, 2004 where former Deputy Sheriff Ken Schreckengost, and former Deputy Eckley testified. Deputy Schrekengost was Deputy Sheriff at the Yucaipa station during the time of the murders. (4/1/05 HRT 8.) In January 1983, he was promoted to Senior Deputy and assigned as watch commander

---

[44] Deputy Eckley stated that Ms. Roper's knowledge regarding the connection between the coveralls and the Ryen/Hughes murders was obtained after she and some other "witches" went through "some kind of trance" which caused her to "just know" that they were worn by someone involved in the murders. (Resp't Evid. Hearing Notebook 13, Ex. LLLLL at 6-7.)

over the deputies in the field. (4/1/05 HRT 54.) He had no recollection of initialing the disposition report, but recognized his initials on the report. (4/1/04 HRT 31.) As a watch commander, the disposition reports would normally have been in his inbox because "nine out of ten times" the person who filled out report would not be on the same shift. (4/1/05 HRT 56.) In reviewing a disposition report, he looked to see if the report was properly filled out. (4/1/05 HRT 56.) Deputy Schreckengost stated he never discussed the coveralls with Deputy Eckley and has never seen the coveralls. (4/1/05 HRT 57.)

Deputy Eckley was a former deputy of the San Bernardino Sheriff's Department and was stationed at Yucaipa from 1980 to 1989. (4/1/05 HRT 73-74.) He had no recollection that Deputy Schreckengost had anything to do with the processing or signing of the report. (4/1/05 HRT 112.) Deputy Eckley did not have a discussion with Deputy Schreckengost regarding the destruction of the coveralls. He testified that he made the decision to destroy the coveralls on his own without consulting anyone. (4/1/05 HRT 115.) The testimony of Deputy Shreckengost and Deputy Eckley do not support Petitioner's claims of perjury or withholding of evidence.

C. The Claims of Withholding of Evidence and False Presentation of Testimony Have No Merit

Petitioner's claim concerns whether Deputy Eckley consulted someone else before he decided to destroy the coveralls. As the testimony reveals,

Deputy Eckley acted on his own in destroying the coveralls. Deputy Eckley and Deputy Schreckengost did not have any discussion about the coveralls. Typically, the disposition report was in Deputy Schreckengost's inbox and he only made sure that the form was properly filled out.

Petitioner comments that Deputy Eckley's destruction of the coveralls was in violation of the policies of San Bernardino Sheriff's Department ("SBSD"). However, the defense was aware at the time of trial that Deputy Eckley did not comply with the written policies and practices in the SBSD manual when he destroyed the coveralls. (32 RT 3194-95.) Evidence of the written policies and practices in SBSO manuals at the time the coveralls were destroyed is not newly discovered evidence. The defense was in possession of the manuals at the time of trial. *See People v. Cooper*, 53 Cal.3d at 817, 281 Cal.Rptr. 90, 809 P.2d 865 (trial court did ***988** not err in not admitting into evidence "sheriff's policy manuals regarding the collection and preservation of evidence"). Even if Deputy Eckley violated SBSD policy concerning the destruction of evidence, it does not change his consistent testimony that he destroyed the coveralls without consulting anyone. The discovery of the disposition report does not cast doubt upon the testimony of Deputy Eckley, and does not undermine the findings and conclusions by both this Court and the California Supreme Court that the coveralls were not material exculpatory evidence in Petitioner's case.

Petitioner claims that jurors would not have convicted him had they heard of Petitioner's new

theories. (Pet. at 57.) Any comment by a juror concerning his/her mental process in reaching a verdict in Petitioner's trial is unsupported, inadmissible, and irrelevant to the claim presented by Petitioner. Fed.R.Evid. 606(b);[45] *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (in general juror's statements have traditionally been inadmissible to impeach a verdict); *United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir.2001) ("[a] court may not, under Rule 606(b), consider testimony 'regarding the affected juror's mental processes in reaching the verdict.'") Petitioner's reliance on statements from jurors is improper. No statements regarding the deliberative process are admissible. *See* Fed.R.Evid. 606(b). Moreover, the disposition report hardly constitutes evidence "pointing away" from Petitioner and does not undermine the physical evidence linking Petitioner to the crime by proof beyond a reasonable doubt.

This Court accords deference to the California Supreme Court's decision denying Petitioner's claim on the merits. 28 U.S.C. § 2254(d). The state court's denial of Petitioner's claim on the merits is not contrary to clearly established federal law, and does not rest with an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d).

---

[45] Federal Rule of Evidence 606(b) provides that a "juror may not testify ... to the effect of anything upon ... juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes...." Fed.R.Evid. 606(b).

Accordingly, the Court **DENIES** this claim on the merits pursuant to 28 U.S.C. § 2254(d).

D. Petitioner Does Not Satisfy the Requirements of 28 U.S.C. § 2244(b)

Further, the Court denies the claim pursuant to 28 U.S.C. § 2244(b). If Petitioner has previously adjudicated a claim relating to the destruction of the coveralls in this Court, his pending claim of withholding evidence and false testimony relating to the destruction of the coveralls must also be dismissed. 28 U.S.C. § 2244(b). The gravamen of the claim of withholding evidence and false testimony is the same, regardless of whether Petitioner presents new and different legal arguments or different factual allegations. *See Babbitt,* 177 F.3d at 746. Petitioner is revisiting the reasons the coveralls were destroyed, and renewing his attack on the deputy who was responsible for the coveralls' destruction. *See Cooper I,* 92-CV-427, Amend. Pet. at 310-13. The impact of the destruction of the coveralls on Petitioner's rights at trial has already been adjudicated by this Court, *Cooper I,* 92-CV-427, Aug. 25, 1997 Order at 51-52, and the current legal arguments and different factual allegations stemming from the discovery of a disposition ***989** report with initials signing off on the destruction of the coveralls are not sufficient to evade the mandatory dismissal requirement of 28 U.S.C. § 2244(b)(1). *See Babbitt,* 177 F.3d at 746.

Even if Petitioner's claim were not subject to mandatory dismissal under 28 U.S.C. § 2244(b)(1), his claim is still denied because he could have

presented the legal and factual basis of his pending claim previously with due diligence. *See* 28 U.S.C. § 2244(b). Petitioner already complained about the destruction of the coveralls in his first federal habeas petition. He was aware of Deputy Eckley's role in the destruction of the coveralls, and his testimony at Petitioner's trial regarding his decision and actions regarding the coveralls. *Cooper I,* 92-CV-427, Amend. Pet. at 310-13.

Petitioner's defense investigator reviewed microfiche files in December of 1998, and located a card bearing the initials of the individual who approved the destruction of the coveralls. With due diligence, the card could have been located well before then, and the instant claim could have been presented in Petitioner's first federal habeas petition, that was litigated between 1992 and 1997.

Beyond the due diligence showing, Petitioner would be required to demonstrate that the facts underlying his claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him guilty of the Ryen/Hughes murders. *See* 28 U.S.C. § 2244(b). Petitioner does not meet this requirement. Petitioner's guilt was demonstrated by overwhelming evidence at trial, and has been reaffirmed through post-conviction DNA testing. This Court already determined, as did the California Supreme Court and the trial court, that the coveralls were not material exculpatory evidence and that the law enforcement authorities acted in good faith. *Cooper I,* 92-CV-427, Aug. 25,

1997 Order at 52; *Cooper*, 53 Cal.3d at 811, 281 Cal.Rptr. 90, 809 P.2d 865. Under these circumstances, Petitioner does not meet the requirements of 28 U.S.C. § 2244(b)(2).

VI. Prosecution's Withholding of Evidence and Presentation of False Testimony

Petitioner alleges his constitutional rights were violated when the prosecution withheld material exculpatory evidence, knowingly failed to correct false testimony, proffered perjured testimony, and knowingly argued false theories to the jury. (Pet. at 43-47.) As detailed below, Petitioner fails his burden and the Court **DENIES** these claims under 28 U.S.C. § 2244(b) and on the merits.

A. Petitioner's Claims are Denied on the Merits

1. Criminalist William Baird

Petitioner alleges the prosecution failed to provide material exculpatory evidence concerning criminalist Baird's misconduct concerning heroin. (Pet. at 44-45.) If Petitioner has adjudicated a claim relating to the withholding of evidence and false testimony previously, then his latest claim alleging the same transgression must be dismissed. 28 U.S.C. § 2244(b). The gravamen of the claim of withholding evidence and false testimony is the same, regardless of whether Petitioner presents new and different legal arguments or different factual allegations. *See Babbitt*, 177 F.3d at 746. Petitioner already adjudicated a claim relating to Mr. Baird's

connection with heroin. *Cooper I,* Amend. Pet. at ***990** 387; *Cooper I,* 92-CV-427, Aug. 25, 1997 Order at 69-71.

Even if Petitioner's claim were not subject to mandatory dismissal based on 28 U.S.C. § 2244(b)(1), his claim must still be dismissed because he could have presented the legal and factual basis of his pending claim previously with due diligence. 28 U.S.C. § 2244(b). Petitioner could have discovered, with due diligence, the additional information about Mr. Baird's alleged use of heroin, particularly since Petitioner had already focused on Mr. Baird's dismissal from his employment for allegedly stealing heroin.

Moreover, to support his Brady claim, Petitioner must show that the prosecution had knowledge of material exculpatory evidence that was unknown to the defense. *See Agurs,* 427 U.S. at 103, 96 S.Ct. 2392. This Court has already determined in adjudicating Petitioner's first federal habeas petition that the prosecution did not have knowledge of Mr. Baird's alleged dismissal or misconduct while the trial was in progress. *Cooper I,* 92-CV-427, Aug. 25, 1997 Order at 70. Petitioner is not entitled to a second opportunity to litigate this factual question in this Court. 28 U.S.C. § 2244(b).

Petitioner's *Brady* claim also fails to state a prima facie case because he has not established that Mr. Baird's alleged drug abuse constitutes material exculpatory evidence in the context of the entire record. *See Agurs,* 427 U.S. at 112, 96 S.Ct. 2392.

Accordingly, the Court denies the habeas claim regarding Mr. Baird.

2. A-Troop Allegations

i. CIM Correctional Officer Donnie Eddings

Petitioner alleges the prosecution withheld material exculpatory evidence provided by a former inmate at CIM that a Hispanic gang called A-Troop committed the Ryen/Hughes murders. (Pet. at 45.) In order to address this allegation, the Court held an evidentiary hearing on August 6, 2004, where former CIM Correctional Officer Donnie Eddings testified. (8/6/04 HRT 3.) Officer Eddings was a correctional counselor in the Reception Center who conducted intake interviews to determine what level of custody was appropriate for an inmate. She was unaware of the outstanding warrant in the CIM files for Petitioner's rape, aggravated assault, kidnaping, mayhem, and making a terrorist threat arising out of Petitioner's rape and threat to kill victim Lori S. in Pennsylvania. (8/6/04 HRT 4.) The warrant for the rape charges was in the CIM files with the name, David Trautman aka Kevin Cooper, clearly listed, but CIM egregiously erred by not linking its own records of Petitioner's rape to the false name of David Trautman. *(See* NOL filed 4/15/05 CIM Vault, Notebook 9 at 2385-2417.) The Court concludes that Officer Eddings had a substantial motive to deflect guilt from Petitioner due to CIM's institutional error in placing a known rapist in minimum security.

Officer Eddings testified that in 1983, inmate Luparello told her that Doug Ryens's chiropractic office in Santa Ana had been burglarized by a gang called A-Troop. (8/6/04 HRT 8-9.) Officer Eddings was told by this inmate that he thought that Mr. Ryen either pressed charges or testified against the members of the gang following the burglary. (8/6/04 HRT 8-9.) Officer Eddings prepared a written report and submitted it to her supervisor. (8/6/04 HRT 7.)

The prosecution provided defense trial counsel with a memorandum written by ***991** Officer Eddings detailing the information from inmate Luparello, as well as handwritten notes regarding Luparello. *(See* 04-CV-656, NOL filed 7/27/04.) Moreover, the Santa Ana Police Department reports regarding the burglary of the Ryen chiropractic office and other businesses in the same commercial complex were also provided to defense trial counsel by the prosecution. *(See* 04-CV-656, NOL filed 07/27/04.) The burglary of the Ryen chiropractic office was being reported in newspaper articles discussing the Ryen/Hughes murders. A copy of a Los Angeles Times article dated June 7, 1983, which includes information on the burglary, was included in the defense trial file turned over on discovery in 1997 in connection with Petitioner's first federal habeas petition. *(See* Answer, Ex. 56 (copy LA Times article re burglary, from defense trial file).) Given the discovery provided by the prosecution, there was no *Brady* violation.[46] Additionally, defense

---

[46] The Court also notes that Petitioner's attorneys were aware of the information contained in the Eddings memo back in December of 2001 when defense investigator Ingels interviewed

investigator Ingels testified that in 2002 he checked out the information regarding Eddings' allegation and found no merit to the claim. (8/13/04 HRT 141-143.) Therefore, the Court concludes there was no *Brady* violation regarding the Luparello or A-Troop information.

ii. CIM Correctional Officer Richard Krupp

Petitioner further alleges that the prosecution withheld material exculpatory evidence from an unidentified inmate at CIM who allegedly told a correctional counsel named Richard C. Krupp that he had overheard a conversation about the murders. (Pet. at 46.) In order to address this allegation, the Court held an evidentiary hearing on August 6, 24 and 26, 2004, where Officer Krupp, correctional counselor Ted Fahey, and Lieutenant Watch Commander Cornelius Shepherd testified. (8/6/04 HRT 51; 8/24/04 HRT 42-55; 8/26/04 HRT 19-30.) After hearing the testimony of the witnesses and evaluating their credibility, the Court concludes that there was no *Brady* violation.

In 1984, Officer Krupp was a correctional counsel. He conducted intake interviews at CIM Chino. (8/6/04 HRT 51-52.) An inmate relayed to him that three Mexicans in the San Bernardino County jail had claimed to have committed the Ryen/ Hughes murders. (8/6/04 HRT 51-52.) Because the incident occurred so long ago, Officer Krupp could not remember the inmate's name. (8/6/04 HRT 68.)

Officer Eddings and had her sign a declaration. (See 8/13/04 RT (Ingels' testimony).)

Officer Krupp testified that he placed this information regarding the Hispanic males in the inmate's evaluation form and then passed it on to his supervisor, Officer Fahey, and the gang coordinator supervisor, Officer Shepherd. (8/6/04 HRT 53.) Officer Krupp further testified that he discussed a phone call that was placed to the San Bernardino Sheriff's Office by either Officer Fahey or Officer Shepherd with them. (8/6/04 HRT 54-57.)[47]

In contrast to Officer Krupp's recollection, Officer Shepherd credibly testified before this Court that he did not speak to ***992** Officer Krupp regarding information of an inmate claiming to have committed the Ryen/Hughes murders and that he had not passed information along to the San Bernardino Sheriff's Office:

> I was employed at California Institution for Men as a correctional lieutenant at the time of Kevin Cooper's escape. I testified at Cooper's trial regarding his escape from CIM. I have never spoken with Richard Krupp regarding information he obtained from an inmate about the Ryen murders. I did not provide any information to San Bernardino County Sheriff's Department from an inmate at CIM regarding the Ryen murders.

---

[47] The Court notes that Petitioner's attorneys were aware of the information from Officer Krupp back in August of 2001 when defense investigator Paul Ingels interviewed Officer Krupp and had him sign a declaration. (See 8/6/04 HRT 59-61; 8/13/04 HRT (Ingels' testimony).)

(04-CV-656, Resp't Ex Parte Request filed Aug. 18, 2004, Shepherd Decl.; *see also* 8/24/04 HRT 42.)

Mr. Shepherd further testified that he was a lieutenant watch commander for the east facility at CIM Chino from 1983-84 and that although he may have spoken to Mr. Krupp on occasions, it was not within his duties to discuss the substance of prisoner interviews with correctional counselors such as Mr. Krupp. (8/24/04 HRT 42, 44, 51-52, 55.) Mr. Shepherd then testified that he does not recall any meetings with Mr. Krupp or Mr. Fahey regarding the murders. (8/24/04 HRT 50, 64.) He also stated unequivocally that he did not place any phone calls to the San Bernardino Sheriff's Office because such a phone call would be against procedure. (8/24/04 HRT 59.) The normal procedure would be to contact the institutional investigators at CIM Chino, who would then contact the Sheriff's Office if warranted. (8/24/04 HRT 62-63.)

Consistent with Officer Shepherd's testimony, Officer Fahey, correctional counselor at CIM, also credibly testified before this Court that he does not recall any conversations or information received from any of the correctional counselors, including Officer Krupp, or with Officer Shepherd regarding the Ryen/Hughes murders. (8/26/04 HRT 19, 29-30.) Officer Fahey also testified, consistent with Officer Shepherd's testimony, that as a watch commander in the east facility, Officer Shepherd would have had no job related interaction with correctional counselors in the central facility such as Officer Krupp and Officer Fahey. (8/26/04 HRT 29-30.) He also verified that institutional procedure did not permit

correctional counselors to call the Sheriff's Office. (8/26/04 HRT 22-23.) Mr. Fahey testified that in the sixteen years he was at CIM Chino, he did not once call the Sheriff's Office. (8/26/04 HRT 22-23.) The procedure would be to inform the institutional investigators of the information and then they would contact the Sheriff's, if necessary. (8/26/04 HRT 22-24.)

The Court concludes that Mr. Krupp's recollection is contradicted by the credible testimony of Officers Fahey and Shepherd. As Officer Fahey and Officer Shepherd testified, they do not recall receiving any information from Mr. Krupp regarding the Ryen/Hughes murders. Officer Shepherd, as a watch commander in a separate facility would not have been in a professional position to have such information passed on to him from Officer Krupp. Moreover, the alleged phone call placed to the Sheriff's office is not credible given that both Officer Fahey and Officer Shepherd testified that the phone call would never have occurred because it was against procedure for such a phone call to take place, and they did not make the phone call.

Officer Shepherd and Officer Fahey credibly testified that Officer Krupp did not speak to him regarding the hearsay ***993** statements of the three Hispanics. Officers Shepherd, Fahey and Krupp did not speak to the San Bernardino Sheriff's Office regarding those hearsay statements. As with any prominent murder investigation, there were numerous rumors and false claims made in connection with the Ryen/Hughes murders, and a belated report of a multiple hearsay account by an

unknown inmate does not constitute a *Brady* violation.

3. Anthony Ruiz

Petitioner also claims that a *Brady* violation occurred when the prosecution failed to disclose material exculpatory evidence from Anthony Ruiz that law enforcement was ordered to plant evidence inculpating Petitioner. On the eve of the execution, an acquaintance of Mr. Ruiz appeared at a press conference with information that Mr. Ruiz worked for the San Bernardino County Sheriff's Department and allegedly admitted that the San Bernardino's Sheriff's Department had planted evidence to frame Petitioner.

This allegation was not supported by Mr. Ruiz's testimony at the evidentiary hearing on August 6, 2004. Mr. Ruiz testified that he was never employed or associated with the San Bernardino County Sheriff's Department, that he never worked as an informant for them, that he never had access to the crime scene, and that he never had first-hand knowledge of anything regarding the Ryen/Hughes murders. (8/06/04 HRT 76.) He never received any information from any member of the San Bernardino Sheriff's Department regarding the Ryen/Hughes murders. (8/6/04 HRT 79.) All of the information Mr. Ruiz had regarding the murders was hearsay and speculation, and he testified that he never received any information or had any contact with anyone in

the San Bernardino Sheriff's Office.[48] (8/6/04 HRT 79.)

The only conversations Mr. Ruiz claimed to have had with law enforcement regarding the Ryen/Hughes murders were with Jim Parsons of the Riverside County Sheriff's Department, whom Mr. Ruiz would go with on "ride-a-longs." (8/6/04 HRT 103-04; 132) As admitted by Mr. Ruiz at the evidentiary hearing, these conversations with Mr. Parsons were based upon speculation and things heard on the media and on the street. (8/6/04 HRT 115) This is confirmed by Mr. Parsons, now a lieutenant with the Riverside Sheriff's Department:

> I had no knowledge regarding the Ryen/Hughes murders in the Chino Hills beyond what I read in the newspapers or saw on television. I had no participation in the investigation of the murders, because the crimes did not occur in Riverside County. I have no specific recollection of speaking to Ruiz about the Ryen/Hughes murders. Any conversation I would have had with Ruiz would have been based on information available in the media at that time, because I had no other source of information regarding the crimes.

(04-CV-656, NOL filed Aug. 24, 2004, Parsons Decl., Doc. No. 205.) Mr. Ruiz's speculation and hearsay do not constitute material information under *Brady*.

---

[48] The Court sustained objections under Federal Rule of Evidence 403 to non-San Bernardino's Sheriff's office informant activity.

Petitioner's claim of evidence tampering and withholding evidence was raised in Petitioner's sixth and seventh state habeas ***994** petitions and denied on the merits by the California Supreme Court. (Sixth State Hab. Pet. at 37-54; Answer, Ex. 13.) Exhibits concerning Ruiz were filed in support of Petitioner's seventh state petition for writ of habeas corpus, and denied on procedural grounds and on the merits. (Answer, Ex. 14.) Accordingly, this Court accords deference to the California Supreme Court decision denying Petitioner's claims on the merits. *See* 28 U.S.C. § 2254(d). The state court's denial of Petitioner's claim on the merits is not contrary to clearly established federal law, and does not rest on an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d).

4. The "Blue" Shirt

Petitioner alleges a *Brady* violation occurred when the prosecution failed to disclose to the defense that Laurel Epler reported finding a "blue" shirt possibly with blood on it on Peyton Drive on the afternoon of June 6, 1983. Petitioner is incorrect. The dispatch log referencing the report of a "blue shirt" was disclosed to the defense before trial. *(See* IV RT 6.) If Petitioner's counsel at trial was on notice as to the possible existence of material evidence and did not raise that at trial, there is a lack of diligence in raising a *Brady* violation. *See Williams*, 529 U.S. at 435, 120 S.Ct. 1479. In this instance, defense counsel was on notice of the possible existence of the "blue" shirt. The state court trial record documents that defense trial counsel received the daily logs from the San Bernardino Sheriff's Department,

which contains the reference to a "blue" shirt with possible blood being reported on June 6, 1983, on Peyton Drive, by Laurel Epler at 2:41 p.m., in August of 1983.*(See* I CT 75-75; III (8/12/83) RT 14-15, 19; IV (9/2/83) RT 6.) Petitioner's counsel represented to the Court that he received the daily logs; the record confirms his statement. (IV RT 6.)

On January 16, 1984, an amended[49] attachment to the subpoena duces tecum for materials including the "complete daily logs, dispatch records, tape recordings of dispatch or communications made from June 2, 1983, to July 31, 1983, by the Sheriffs or any deputy of the SBSO concerning the investigation and search for suspects in the deaths occurring at 2943 English Road, Chino, on June 4 or 5, 1983, DR 1211029-02, and the escape and attempt to apprehend David Trautman, aka: Kevin Cooper, from CIM on June 2, 1983." (I CT 75-76.) Defense trial counsel Negus' declaration regarding items of discovery stated: "The logs, dispatch records, and tape recordings include actions of officers which may not be memorialized in reports. The actions are relevant to the integrity of physical evidence, other suspects to the crime, and the issue of flight." (I CT 90.)

On September 2, 1983, defense trial counsel Negus stated:

---

[49] On August 8, 1983, Petitioner's defense counsel filed with the San Bernardino County Municipal Court a declaration in support of a subpoena duces tecum. (I CT 61-62.)

> I can indicate to the court that with respect to the four items in the amended subpoena [*see* I CT 7576], that with respect to Item 1 [complete daily logs, dispatch records, tape recordings of dispatch or communications made from June 2, 1983, to July 31, 1983], all items except the tapes that were requested have been received. Mr. Kochis and I have agreed that the tapes will be held by the sheriff's office until such time as we can agree on what part of those tapes will be needed to be recorded for ***995** trial. If we cannot agree, then we will be coming back to the court at some future time, but mainly the tapes will be preserved until we can work that out.

(IV RT 6.)

The trial prosecutor confirmed the accuracy of Mr. Negus' representations to the trial court. (IV RT 6.) Moreover, it is clear that defense trial counsel appreciated the relevance of the information as it related to the integrity of physical evidence and other suspects to the crime at the time he sought the daily logs and dispatch information. *(See* I CT 75-76.)

John Kochis, one of the prosecuting attorneys in the Petitioner trial, testified at the evidentiary hearing that discovery and documents related to the dispatch records were provided to Petitioner's defense at trial by way of a subpoena duces tecum. (8/13/04 HRT 183-84.) Mr. Kochis testified that the San Bernardino Sheriff's daily logs from June 4-6, 1983 (Resp't Evidentiary Hr'g Ex. MMMM-PPPP), as well as the documents pertaining to the burglary of the Ryen chiropractic business in 1983 (Resp't

Evidentiary Hr'g Ex. UUUU), were turned over to Petitioner's defense team at trial. (8/13/04 HRT 182-84.) Petitioner represented to the trial court that he had a copy of the daily log prior to trial. *(See* I CT 75-75; III (8/12/83) RT 14-15, 19; IV (9/2/83) RT 6.) Because Petitioner represented to the trial judge that he had the daily logs, the Court relies on his representation made on the record to the court at that time. As an attorney, trial counsel has a professional obligation to be truthful to the Court. Rule of Professional Conduct of the State Bar of California 5-200. Petitioner had the daily logs referencing the report of a "blue" shirt and the collection of that evidence was disclosed to the defense before trial.[50]

Petitioner has not presented a viable *Brady* claim, or any other constitutional violation warranting habeas relief. The fact that Petitioner claims that trial counsel has no recollection of a blue shirt twenty-two years later is not surprising. Laurel Epler had no recollection of a blue shirt when she was interviewed about the shirt. *(See* 04-CV-656, NOL filed Aug. 18, 2004, Doc. No. 187 at 5, 12-13 and 20.)

Ms. Epler was contacted on August 3, 2004 about the shirt. In the recorded statement, Ms. Epler stated that she does not remember calling law enforcement regarding the shirt, she does not recall

---

[50] Petitioner strategically may not have wanted to focus on a blue shirt since Petitioner testified at trial that he had a blue prison shirt in a bag he was carrying when he left the hideout house the night of the murders. (99 RT 5852.)

the color of the shirt, and she does not remember where the shirt was found. (04-CV-656, NOL filed August 18, 2004, Doc. No. 187 at 5, 12-13, and 20.) Ms. Epler testified before this Court that her statements at that interview were true and correct and were to the best of her best recollection. (8/26/04 HRT 124.)

At the evidentiary hearing, Ms. Epler testified that she vaguely remembers finding the "blue shirt" when she was driving home. (8/26/04 HRT 133-34.) She testified that she could not recall exactly where the shirt was found and that she could not recall driving and seeing the shirt on the side of the road, although she believes that it must have been close to Peyton and Glenridge because that is where she regularly drove her car. (8/26/04 HRT 133-34.) She also testified that her memory of the shirt was very vague and it was only ***996** after referencing the log that mentioned the "blue shirt" and speaking to Petitioner's defense investigators that she recalled anything about the shirt. (8/26/04 HRT 123-24, 149.)

Finally, Ms. Epler testified that she had been influenced by letters shown to her by Petitioner's attorneys regarding alleged suppression of evidence and law enforcement cover-ups in this case. (8/26/04 HRT 179-80.) She stated that she did not think Petitioner committed the murders after reading the materials sent to her by Petitioner's attorneys. (8/26/04 HRT 179-80.) Due to Ms. Epler's previous statements where she did not recall the T-shirt, its color, or the location or time it was found and given the passage of many years and failure of recollection, the Court questions whether Ms. Epler actually

recalls a blue shirt. Notwithstanding, the daily logs referencing the call placed to the Sheriff's Office regarding the shirt were turned over to the defense counsel at trial and therefore are not a proper basis for a habeas claim.

Respondent contends that the report of a "blue shirt" found on Peyton Drive listed on the Sheriff's daily log of June 6, 1983, is actually the tan T-shirt at issue in this case (Trial Ex. 169). According to Mr. Kochis, none of the documents logging the evidence at the San Bernardino Crime Lab show a "blue shirt." (8/13/04 RT 198-201.) Rather, those documents only reflect the receipt of the T-shirt introduced at trial by the defense (Trial Ex. 169). (8/13/04 RT 198-201.) Moreover, Deputy Fields, now deceased, is the officer listed on the daily logs as picking up the "blue shirt" on Peyton Drive after Laurel Epler reported the shirt to the San Bernardino Sheriff's Office on June 6, 1983.(Resp't Evidentiary Hr'g, Ex. OOOO, at 9; 04-CV-656, Doc. No. 143.) Mr. Kochis testified that the only shirt Deputy Fields turned over to the crime lab was the T-shirt in this case (Trial Ex. 169). (8/13/04 RT 199-200.) The existence of the tan shirt is not in dispute. In fact, photographs of the tan T-shirt were taken at the time it was picked near the side of the road on Peyton Drive. (Resp't Evidentiary Hr'g, Ex. CCCCC-1 through CCCCC-5.)

Petitioner argues that the "tan shirt" was picked up by Detective Fields on June 7, 1983, the day after the "blue shirt" was picked. The daily log of June 7, 1983 has no entry regarding a "tan shirt." *(See* NOL filed May 5, 2005 of Daily Log of June 7, 1983 for In

Camera Review.) Although Detective Fields' report, dated June 10, 1983, states he picked up the "tan shirt" on June 7, 1983, he may have meant June 6, 1983. In any event, the "tan shirt" that was picked up by Detective Fields and photographed was collected and tagged with Property Tag No. A-58046 and stored in the Sheriff's evidence locker. (Traverse, Ex. 160.) At trial, Detective Fields identified the "tan shirt" (Trial Exhibit 169) as the T-shirt he recovered on the side of the road. (101 RT 6511.) Therefore, the "blue shirt" reported on June 6, 1983 is most likely the tan T-shirt (Tr. Exhibit 169) at issue in this case as testified by Mr. Kochis. (8/13/04 HRT 198-201.)

Even if there were a blue shirt, there is no showing of a material *Brady* violation. Petitioner's blood and the victims' blood were on the tan shirt. Detective Fields, the officer who was dispatched to pick up the blue shirt, is now deceased, (04CV-656, Doc. No. 143), and Sergeant Billy Arthur, his supervisor in homicide is also deceased. (4/22/05 HRT 22.) Any further investigation would be of limited value as the two main individuals that would have any significant ***997** knowledge regarding the blue shirt are deceased, and there has been no showing of bad faith in light of the fact that defense counsel represented to the Court that he had received the daily logs.

In evaluating the merits of Petitioner's claim, this Court accords deference to the California Supreme Court decision denying Petitioner's claim on the merits. *See* 28 U.S.C. § 2254(d). The state court's denial of Petitioner's claim on the merits is not contrary to clearly established federal law, and does

not rest on an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d). This Court also denies this claim pursuant to 28 U.S.C. § 2244(b) because Petitioner has failed to demonstrate that the facts underlying his claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him guilty of the Ryen/Hughes murders. *See* 28 U.S.C. § 2244(b). Petitioner's guilt was demonstrated by overwhelming evidence at trial, and has been reaffirmed through post-conviction DNA testing.

VII. Evidence Tampering and Withholding of Evidence

Petitioner contends his constitutional rights were violated when law enforcement tampered with key pieces of evidence, presented misleading and false testimony, and withheld material exculpatory evidence. (Pet. at 29, 31-43.) Petitioner fails to meet his burden and the Court **DENIES** these claims on the merits and pursuant to 28 U.S.C. § 2244(b).

A. The Court Denies the Claims of Evidence Tampering and Withholding Evidence

Petitioner alleges planting of or tampering with items of evidence. Petitioner's claims of evidence tampering were rejected after a post-conviction evidentiary hearing in 2003. In a post-conviction evidentiary hearing, the Honorable William Kennedy of the San Diego Superior Court concluded that there was no merit to Petitioner's claim of

evidence tampering. (92-CV-427 NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order dated July 2, 2003 at 10.)

Petitioner's complaints about the handling of A-41 is repetitive of his complaints that were litigated during trial, on direct appeal, in post-conviction motions and in previous habeas petitions. (Pet. at 33-34.) Petitioner's expert at trial, Dr. Edward T. Blake, had no complaint about the results presented at trial by the prosecution regarding A-41. (105 RT 7559-60.) Defense trial counsel stated in a declaration that in hindsight he would have presented another expert at trial because Dr. Blake confirmed the validity of the prosecution's evidence regarding A-41. *Cooper I,* 92-CV-427, Amended Pet., Ex. T at 560("The district attorney was able to bring out the fact that [Dr. Blake] believed that A-41 had been tested in a proper manner and the results were accurate.") Moreover, Petitioner ignores the fact that the post-conviction testing on A-41 was done with the assistance of Petitioner's own nationally recognized DNA experts, Dr. Blake and Christopher Plourd. Petitioner offers no clear and convincing evidence to rebut the presumption of correctness that attaches to the state court's express factual findings that there was no tampering with A-41 at ***998** the post-conviction evidentiary hearing. *See* 28 U.S.C. § 2254(e).

Additionally, at trial, the defense knew about the testing of the UU series. Brian Wraxall testified that he reviewed the evidence series from UU-1 through UU-16 and explained his results. (94 RT 4726.) The defense knew about Mr. Wraxall's testing and

results of the UU series since the trial and after trial. (94 RT 4726.) Since Petitioner was on notice as to the existence of material evidence, there is a lack of diligence in raising a *Brady* violation. *See Williams*, 529 U.S. at 435-38, 120 S.Ct. 1479.

As to the T-shirt, found on Peyton Road, it was never used as evidence against Petitioner and cannot be considered as affecting the result in Petitioner's trial. The T-shirt was introduced by the defense and never used to inculpate Petitioner. The San Diego County Superior Court took evidence on Petitioner's tampering claim with respect to the T-shirt, and expressly found that the testimony proffered by the prosecution that no tampering had occurred was credible and unrebutted by a complete absence of evidence by Petitioner. (92-CV-427 NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order dated July 2, 2003 at 10.) The state court's findings are entitled to a presumption of correctness. *See* 28 U.S.C. § 2254(e). The California Supreme Court's denial of Petitioner's writ of mandate relating to the denial of his post-conviction DNA motion does not rest on an unreasonable determination of the facts, and is consistent with federal law within the meaning of 28 U.S.C. § 2254(d). In this petition, Petitioner has not presented any clear and convincing evidence that would overcome the presumption that attached to the state court's factual findings.

Petitioner's allegations about the cigarette butts, the rope, and the hatchet sheath are also without merit. Petitioner was represented by an experienced and capable attorney. *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 8. The cigarette butts, the rope, and

the hatchet sheath were all used as evidence against Petitioner, and defense counsel was focused on that evidence. (*See, e.g.*, 106 RT 7788, 7790, 7794 (defense closing argument).) The state court rejected Petitioner's claims of evidence tampering after an evidentiary hearing in 2003. Finally, EDTA preservative testing of the T-shirt has not undermined the post-conviction DNA testing results confirming Petitioner's guilt.

In addition Petitioner's claims are undermined because he had a very able and skilled defense attorney representing him. Indeed, this Court and the California Supreme Court both made express findings that Petitioner received "an extraordinarily vigorous and able defense." *Cooper*, 53 Cal.3d at 824, 281 Cal.Rptr. 90, 809 P.2d 865; *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 8. Defense trial counsel David Negus' extensive educational and prior litigation experience were developed at the evidentiary hearing conducted by this Court regarding Petitioner's first federal habeas petition, *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 8, and he had the benefit of able post-conviction counsel. This weighs against Petitioner's vague suggestions that the evidence introduced against him at trial suffered from any deficiencies beyond those thoroughly litigated and developed in the trial court and in post-conviction evidentiary proceedings. Accordingly, the Court concludes there is no merit to Petitioner's tampering allegation and the state court's rejection of Petitioner's vague and unsubstantiated accusations over two decades after the crimes that evidence was planted is not contrary

*999 to federal law, nor based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

B. Petitioner Does Not Satisfy the Requirements of 28 U.S.C. § 2244(b)

If Petitioner has previously adjudicated a claim relating to the withholding of evidence, planting of evidence, failure to collect evidence, and false testimony, then his pending claims must be dismissed. 28 U.S.C. § 2244(b). The gravamen of claims of withholding evidence, failure to preserve evidence, and false testimony is the same, regardless of whether Petitioner presents new and different legal arguments or different factual allegations. *See Babbitt*, 177 F.3d at 746.

Even if Petitioner's claim were not subject to mandatory dismissal based upon § 2244(b)(1), his claim is still denied because he could have presented the legal and factual basis of his pending claim previously with due diligence. 28 U.S.C. § 2244(b). As to the cigarette butts, the defense knew about the testing of the cigarette butts by Mr. Wraxall prior to trial and at the time of trial. Mr. Wraxall testified at trial about his testing of V-12 and V-17. (94 RT 4702-43.) He testified he and Dr. Blake, Petitioner's expert, shared the same facility. (94 RT 4730.) Mr. Wraxall stated he conducted testing of the cigarette butts in consultation with Dr. Blake and Dr. Blake had full access to Wraxall's notes and results. (94 RT 4732.) As a result, Petitioner does not satisfy the requirements of 28 U.S.C. § 2244(b).

Petitioner is simply making unsubstantiated allegations of tampering as to evidence that was used against him at trial, or that subsequently confirmed his guilt from post-conviction DNA testing. The defense presented a comprehensive pretrial motion in an effort to exclude evidence based on allegations the crime scene had not been properly managed, and that evidence was not collected or mishandled. Petitioner was represented by an experienced and capable attorney at trial. *Cooper I*, 92-CV-427, Aug. 25, 1997 Order at 8. Petitioner's allegations have already been addressed at trial, on appeal, and in his first federal habeas petition. Petitioner could have discovered any of the alleged deficiencies with respect to the chain of custody of evidence, mishandling of evidence, or tampering with evidence previously with due diligence. The same is true as to the purported false testimony and withholding of evidence. Petitioner had excellent post-conviction counsel, and Petitioner could have raised the same allegations he chose to present in the eleventh hour of this case previously with due diligence.

Beyond the due diligence showing, Petitioner would be required to demonstrate that the facts underlying his claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him guilty of the Ryen/Hughes murders. 28 U.S.C. § 2244(b). Petitioner does not meet this requirement. Petitioner's guilt was demonstrated by overwhelming evidence at trial, and has been reaffirmed through post-conviction

DNA testing. Therefore, the Court **DENIES** these claims.

VIII. Josh Ryen's Videotape/Audiotape Testimony

A. Claim Re Josh Ryen's Videotape/Audiotape Testimony is DENIED on the Merits

Petitioner alleges that his federal constitutional rights were violated because of ***1000** the admission of videotape and audiotape evidence. (Pet. at 47-52.) The Court disagrees. The jury heard two taped statements of Joshua Ryen pursuant to a stipulation. The first was a videotape of a December 9, 1984 interview in which Josh, then age ten, was questioned under oath by the prosecutor and defense counsel. The second was an audiotape of a December 1, 1983 interview with Dr. Lorna Forbes, his treating psychiatrist and a specialist in treating children who survived the murder of a family member. Josh did not identify anyone as the assailant. (95 RT 4932-70; 4971-73; Trial Exs. 641, 642.)

The defense received a benefit from the stipulation, as Josh Ryen did not identify his assailant and the jury heard of his earlier statement concerning three Hispanic workers coming to the ranch. The defense also avoided the drama and sympathy that would have undoubted occurred had the defense called victim Josh Ryen to the stand in the trial and heard his firsthand recollection about a man with bushy hair. (4/22/05 HRT 133.) Petitioner's claim was also denied by the state court on

independent and adequate state grounds. This Court defers to the denial of Petitioner's claim on the merits by the California Supreme Court pursuant to 28 U.S.C. § 2254(d). Accordingly, Petitioner's claim is **DENIED** on the merits.

B. Petitioner Does Not Satisfy the Requirements of 28 U.S.C. § 2244(b)

Petitioner does not satisfy the requirements of 28 U.S.C. § 2244(b)(2). Petitioner must demonstrate that he could not have presented his claim previously with due diligence. 28 U.S.C. § 2244(2)(b)(I). The facts and circumstances surrounding Joshua's statements and the manner in which his testimony was presented to the jury have been matters of record since trial. *Cooper*, 53 Cal.3d at 800-801, 281 Cal.Rptr. 90, 809 P.2d 865.

Assuming arguendo that Petitioner could demonstrate that the factual and legal basis of his claim could not have been discovered previously with due diligence, he would still be required to demonstrate that the facts underlying his claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him guilty of the Ryen/Hughes murders. *See* 28 U.S.C. § 2244(b). Petitioner does not meet this standard. The guilt of Petitioner was demonstrated by overwhelming evidence at trial, and has been reaffirmed through post-conviction DNA testing. Petitioner has not established by clear and convincing evidence that no juror would have

convicted Petitioner if Josh Ryen was subjected to testifying in person before the jury. Accordingly, this Court **DENIES** this claim pursuant to 28 U.S.C. § 2244(b).

IX. Denial of Access to the Judicial Process

Petitioner claims that his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated when the San Diego County Superior Court directed him to file his petition for writ of habeas corpus and related motions directly in the California Supreme Court. (Pet. at 53-54.) Petitioner's claim is properly **DENIED** as failing to present a cognizable federal question for this Court's consideration. Even if the claims were a cognizable federal question, he does not satisfy the requirements of 28 U.S.C. § 2244(b). Even assuming arguendo that Petitioner ***1001** met the requirements of 28 U.S.C. § 2244(b), this Court also **DENIES** Petitioner's claim on the merits with deference to the California Supreme Court's denial of Petitioner's claim because that decision is not contrary to clearly established federal law nor based on an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d).

A. Petitioner Fails to Present a Cognizable Federal Question

Petitioner's complaint involves the application of and interpretation of state law and does not implicate the federal Constitution. In *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), the United States Supreme Court reiterated the well-established rule that

federal habeas corpus relief does not lie for errors of state law, and that it is not the policy of the federal courts to re-examine state court determinations of state law questions. In conducting a federal habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States. *Id.* at 68, 112 S.Ct. 475 (citations omitted). Petitioner's claim fails to present a federal question cognizable on federal habeas review and is properly **DENIED**. *See id.* 67-68, 112 S.Ct. 475.

B. Claim of Denial of Access to the Judicial Process is DENIED on the Merits

This Court also defers to the state court's denial of the claim on the merits. (Sixth State Habeas Pet., (Claim VII) at 88-91; Answer, Ex. 13.) The California Supreme Court's denial of Petitioner's claim is not contrary to clearly established federal law, nor does it rest on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). This Court therefore **DENIES** this claim pursuant to 28 U.S.C. § 2254(d).

C. Petitioner Does Not Satisfy the Requirements of 28 U.S.C. § 2244(b)

In order to be heard in a successive petition, Petitioner must demonstrate that the claim could not have been previously presented with the exercise of due diligence, and that the facts underlying his claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have

found him guilty of the Ryen/ Hughes murders. *See* 28 U.S.C. § 2244(b)(2). Petitioner does not satisfy the second prong of 28 U.S.C. § 2244(b)(2), because his complaint about being directed to file in the California Supreme Court is of no import to a juror's determination of his guilt.

X. Petitioner's Claims are Procedurally Barred

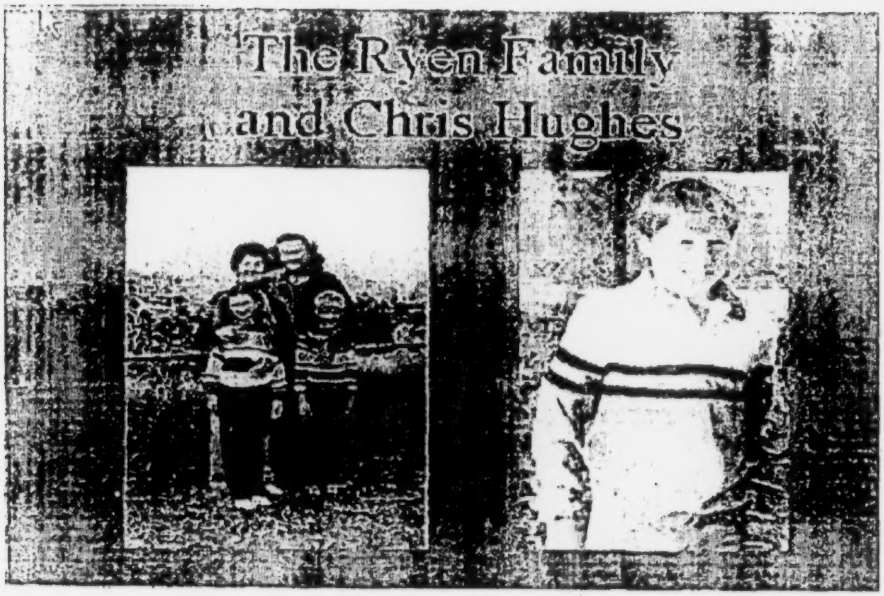
Even if Petitioner were to satisfy the requirements of 28 U.S(C. § 2244(b), the Court denies his claims from this successive petition as procedurally barred. The California Supreme Court denied Petitioner's claims on February 5, 2004, as untimely and successive citing to *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993) and *In re Robbins*, 18 Cal.4th 770, 77 Cal.Rptr.2d 153, 959 P.2d 311 (1998). (Sixth State Habeas Pet. at 37-54 (claim IV); Answer, Ex. 13.) Respondent argues that Petitioner's claims are procedurally barred. In response, Petitioner fails to raise "specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application ***1002** of the rule." *Bennett*, 322 F.3d at 584, 586. Accordingly, this Court also **DENIES** these claims in the successive petition as procedurally barred.

XI. Lingering Doubt

The Court recognizes that any case involving the death penalty is a serious matter. The capital penalty for this case will continue to be highly debated in society. However, a trial court is bound by

the law and cannot be influenced by the positions of either side of the death-penalty issue. As an alternative to the death penalty, Petitioner argues there is sufficient evidence to reduce his sentence to life without parole under the doctrine of lingering doubt. Respondent argues that Petitioner is foreclosed from raising a claim relating to the penalty phase of his trial, as successive habeas petitions are limited to guilt phase issues, and the penalty-phase claim was previously decided by the court against Petitioner, and affirmed by the Ninth Circuit. *See Greenawalt v. Stewart*, 105 F.3d 1268(9th Cir.1997) (ineffective assistance of counsel at sentencing). The Court continues to believe, in light of the totality of the record, that Petitioner received an extraordinarily able defense at trial, and his claims of ineffective assistance of counsel and *Brady* violations are without merit. In addition, Petitioner has not shown any legal authority to reduce his penalty to life without parole in this successive habeas petition. At this time, the Court concludes that it is not appropriate for this Court to alter the valid judgment of the state court that has determined on multiple occasions that Petitioner deserves the death penalty. As an aggravating factor, these brutal murders have forever adversely impacted the lives of the victims. (4/22/05 HRT 124 (Mr. Hughes), 125 (Mrs. Hughes), 128 (Josh Ryen).) Accordingly, the Court **DENIES** Petitioner's claim of lingering doubt.

*1003



CONCLUSION

In this case, Petitioner has had multiple habeas corpus petitions in state and federal court. In addition to the direct review affirming Petitioner's conviction by the California Supreme Court, he has state petitions in Court, eight petitions for writ of certiorari in the United States Supreme Court, two habeas petitions in the United States District Court, two habeas petitions *1004 in the United States Supreme Court, a habeas petition in the San Diego County Superior Court and two applications for authorization to file a successive petition in the Ninth Circuit Court of Appeal. Post-conviction DNA testing confirms that Petitioner committed the murders of the Ryen/Hughes victims. This Court has conducted mitochondrial DNA testing and EDTA

testing, has heard testimony from forty-two witnesses, independently reviewed the evidence, including the trial and evidentiary hearing transcripts and all of the parties' submissions and arguments. Based on this careful review, the Court agrees with the post-conviction DNA results and all of the courts that came before it in this case: Petitioner is the one responsible for these brutal murders. Accordingly, the Court **DENIES** the successive petition for writ of habeas corpus.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
141
(2) 09-363 SEP 24 2009
No. 09-___ OFFICE OF THE CLERK

In the Supreme Court of the United States

KEVIN COOPER,

Petitioner,

v.

ROBERT K. WONG, ACTING WARDEN, SAN QUENTIN STATE PRISON, SAN QUENTIN, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

APPENDIX VOLUME II TO PETITION FOR WRIT OF CERTIORARI

David T. Alexander
Law Office of David T. Alexander
332 Sheridan Avenue
Piedmont, CA 94611
Telephone: (650) 387-4382
Facsimile: (510) 654-3773

*Norman C. Hile
ORRICK, HERRINGTON & SUTCLIFFE LLP
400 Capitol Mall
Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7900
Facsimile: (916) 329-4900

Counsel for Petitioner

September 24, 2009

* Counsel of Record

APPENDIX B

UNITED STATES COURT OF APPEALS,

NINTH CIRCUIT

KEVIN COOPER,
PETITIONER-APPELLANT
v.
JEANNE WOODFORD, WARDEN, SAN QUENTIN STATE PRISON, SAN QUENTIN, CALIFORNIA,
RESPONDENT.

No. 04-70578.

February 9, 2004.

*1118 Before SCHROEDER, Chief Judge, KOZINSKI, TASHIMA, SILVERMAN, GRABER, WARDLAW, W. FLETCHER, FISHER, TALLMAN, RAWLINSON and BYBEE, Circuit Judges.

Order; Partial Concurrence and Partial Dissent by Judge SILVERMAN; Dissent by Judge TALLMAN.

ORDER

A judge of this Court called for en banc review of the February 8, 2004, three-judge panel order in this case. A majority of the non-recused judges has voted in favor of en banc review of petitioner Kevin

Cooper's application to file a second or successive petition for a writ of habeas corpus in the district court. *See* 28 U.S.C. § 2244(b)(3)(A). The statute does not allow a petition for rehearing of a denial of authorization to file a second or successive application, but we have *sua sponte* power to rehear such a denial en banc. *Thompson v. Calderon*, 151 F.3d 918, 922 (9th Cir. 1998) (en banc), *cert. denied*, 524 U.S. 965, 119 S.Ct. 3, 141 L.Ed.2d 765 (1998); *In re Byrd*, 269 F.3d 585(6th Cir. 2001), *cert. denied sub nom. Bagley v. Byrd*, 534 U.S. 1109, 122 S.Ct. 913, 151 L.Ed.2d 880 (2002); *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997). Cooper is scheduled to be executed at 12:01 a.m. tomorrow morning.

The district court denied Cooper's first federal petition in 1997, and we affirmed in *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001), *cert. denied*, 537 U.S. 861, 123 S.Ct. 238, 154 L.Ed.2d 100 (2002). ***1119** Through newly obtained counsel, Cooper filed with this Court on February 6, 2004, an application to file a second or successive application in the district court. Cooper also filed a motion for a stay of execution. A majority of the three-judge panel voted to deny the application and the stay yesterday, February 8, 2004.

Cooper has made a claim of actual innocence, accompanied by a claim that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Because Cooper makes a claim of actual innocence accompanied by a claim of a constitutional violation, he is making a "gateway" claim under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct.

851, 130 L.Ed.2d 808 (1995). To make a successful claim under *Schlup*, "a petitioner must show that in light of all the evidence, including new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Carriger v. Stewart*, 132 F.3d 463, 478(9th Cir. 1997) (en banc) (quoting *Schlup*, 513 U.S. at 327, 115 S.Ct. 851). The Supreme Court in *Schlup* "emphasized that in considering all the available evidence, the court is not bound by the rules of admissibility, but must consider 'all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" *Id.*

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), enacted in 1996, a petitioner seeking authorization to file a second or successive application for habeas corpus must satisfy two statutorily imposed conditions. He must show that

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §§ 2244(b)(2)(B)(i) and (ii).

The AEDPA requirements for a second or successive application are stricter than the *Schlup* standard in two ways. First, § 2244(b)(2)(B)(i) requires that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." There is no requirement under *Schlup* that the factual claim was not discoverable through the exercise of due diligence. Second, § 2244(b)(2)(B)(ii) requires that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing evidence* that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." (Emphasis added.) *Schlup* requires only that an applicant show that it is "more likely than not" that no reasonable fact-finder would have found him guilty.

We should grant authorization to Cooper to file a second or successive application for habeas corpus if we find that he has made a prima facie case of success on the merits of such an application. "By '*prima facie* showing' we understand simply a sufficient showing of *possible* merit to warrant a fuller 2075 exploration by the district court." *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)) (emphasis added).

We do not for purposes of this order decide whether the *Schlup* standard or the standard of

28 U.S.C. § 2244(b)(2)(B) applies.*1120 Under either standard, we hold that Cooper is entitled to file a second or successive application.

I. BACKGROUND

On June 2, 1983, Cooper escaped from the minimum security area of the California Institute for Men (CIM) where he was incarcerated. He broke into and hid in an empty house in Chino Hills, about two miles away, in San Bernardino County, southeast of Los Angeles. Cooper made telephone calls from this house to his girlfriend asking for money, but she refused to help him. Cooper's last call from the house was at about 8:00 p.m. on June 4.

The Ryens lived next door, about 125 yards away from the house in which Cooper was hiding. During the night of June 4, 1983, the members of the Ryen household were viciously attacked. Doug and Peggy Ryen, the father and mother, were killed, as were their ten-year-old daughter, Jessica, and an eleven-year-old houseguest, Chris Hughes. Doug and Peggy's eight-year-old son, Josh, was left for dead but survived. The bodies of Doug, Peggy, Jessica, and Chris, as well as the still-living Josh, were discovered the next day by Chris's father. All of the murder victims were killed by multiple chopping, cutting, and puncture wounds. Josh suffered the same type of wounds. Jessica was found clutching a substantial amount of fairly long blond or light brown hair in her hand.

Cooper was apprehended at the end of July 1983, and he was tried for capital murder in late 1984 and

early 1985. Cooper took the stand and testified that he was innocent. He has consistently maintained his innocence since that time. Cooper testified at trial that he never went to the Ryen house. He testified that he left the house in which he had been staying after that last phone call at 8:00 pm on June 4 and hitchhiked to Mexico. Uncontradicted evidence at trial indicated that Cooper checked into a hotel in Tijuana at about 4:30 p.m. the next day, June 5. After seven days of deliberation, the jury found Cooper guilty of death-eligible first degree murder. After four additional days of deliberation, the jury sentenced Cooper to death.

II. *BRADY* VIOLATION

Cooper attaches two new sworn declarations to his application, both signed in January 2004. These declarations, if believed, appear to indicate that a *Brady* violation has taken place and that crucial evidence introduced at trial was not reliable. Only two pieces of evidence at trial connected Cooper to the Ryen house. One was a bloody tennis shoe print found on a sheet in Doug and Peggy's bedroom. The other was a single spot of blood found on a wall in the hallway.

There was testimony at trial about the print of a "Pro-Ked Dude" tennis shoe found on a sheet in the Ryens' bedroom, as to which the testimony of two witnesses, William Baird and James Taylor, was particularly important. The California Supreme Court specifically discussed and relied on the testimony of these two men in sustaining Cooper's conviction on direct appeal. *People v. Cooper*,

53 Cal.3d 771, 797-98, 281 Cal.Rptr. 90, 809 P.2d 865 (1991).

A company representative testified at trial that "Pro-Ked Dude" tennis shoes are manufactured by Stride Rite solely for distribution in prisons and other institutions. They are not distributed to the general public. The sheet from the Ryens' bedroom was initially not thought to have any footprints. However, a bloody footprint was discovered on the sheet after it was taken to the lab and refolded in the manner it had been folded when the footprint was made. William Baird, the Crime ***1121** Laboratory Manager, testified that the shoe print on the sheet matched two prints found in the other house, and that all of the prints had been made by a close-to-new "Pro-Ked Dude" shoe. Baird further testified that he had a close-to-new "Pro-Ked Dude" shoe of approximately the same size in his lab, previously obtained from another prison. He testified that this shoe allowed him to analyze the print on the sheet and determine that it had come from a prison-issued "Pro-Ked Dude" shoe.

James Taylor, an inmate at CIM during the time Cooper was incarcerated, was a recreation attendant. Taylor testified at trial that he initially gave Cooper a pair of "P.F. Flyer" tennis shoes. He testified that Cooper, then imprisoned under the false name of David Trautman, exchanged his "P.F. Flyers" for a pair of black "Pro-Ked Dudes" a few days before he was transferred to the minimum security area. Cooper escaped from the prison soon after he was transferred to the minimum security area.

Cooper attaches to his application a sworn declaration of Midge Carroll, who was Warden of CIM at Chino while Cooper was incarcerated there. Warden Carroll's declaration, dated January 30, 2004, states:

> 1. I was the Superintendent, or Warden, of the California Institution for Men at Chino, California, from 1982 through 1985. As Warden of this state penal facility, I had extensive contact with members of the San Bernardino Sheriff's Department who were responsible for the investigation of Kevin Cooper as a suspect in what became known as the Chino Hills Murders.
>
> 2. I was employed by the California Department of Corrections from 1966 until I permanently retired in 1999....
>
> 3. As the Warden of the California Institute for Men at Chino, my contact with San Bernardino County deputy sheriffs about aspects of the investigation in the Kevin Cooper case included conversations with one of the lead detectives about shoeprint evidence found at the crime scene. I communicated to one of the lead investigators that the notion that the shoeprints in question likely came only from a prison-issue tennis shoe was inaccurate. I came to this conclusion after conducting a personal inquiry of the appropriate staff, including the deputy warden, the business manager responsible for procurement, and

> the personnel responsible for warehousing. I learned that the shoes we carried were not prison-manufactured or specially designed prison-issue shoes. I learned that the shoes were common tennis shoes available to the general public through Sears and Roebuck and other such retail stores. I passed this information along to the detective. Had I been contacted, I would have testified to this on behalf of either the prosecution or defense, and I would have provided supporting documentation.

Cooper also attaches a sworn declaration of his present counsel stating that Cooper's investigators became aware of the information contained in Warden Carroll's declaration on January 30, 2004, the date the declaration was signed.

The declaration of Warden Carroll makes out a prima facie case of a *Brady* violation. The date of the Carroll declaration, and counsel's declaration that Cooper first became aware of the information in the Carroll declaration on that same date, together make out a prima facie case that the information could not have been previously discovered through the exercise of due diligence.

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the prosecution has a constitutional***1122** obligation to turn material exculpatory evidence over to the defendant. This obligation is independent of any specific request by the defendant for such information. *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d

342 (1976). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *see also Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

The significance of Warden Carroll's communication would have been clear to San Bernardino Sheriff's Department investigators. Because of the testimony of Baird and Taylor, the State was able to tell a damaging story about the presence of a bloody "Pro-Ked Dude" footprint in the bedroom of the murder victims, a footprint only Cooper, an escaped prisoner, could have left. But if Warden Carroll had been put on the stand and had been believed by the jury, the jury would have known that Cooper was almost certainly not wearing "Pro-Ked Dude" shoes.

Cooper also attaches to his declaration a hand-written sworn declaration of James Taylor, dated January 8, 2004, which states:

> 1. I was an inmate at the Reception Center West (RC-W) at the California Institute for Men in Chino California in May and June of 1983.
>
> 2. During that period of time, I met David Trautman, whose real name I understand to be Kevin Cooper. I met Kevin when he tried

> out for the basketball team. My job at the prison was recreation attendant. I was responsible for issuing basketball shoes to men in our unit who played on the team.
>
> 3. I issued only one pair of shoes to Kevin Cooper. I issued him a pair of P.F. Flyers. This brand was the best brand of shoe for basketball that the prison stocked. Kevin did not trade these shoes in to me for a pair of Keds, nor did he trade these shoes in to me for any other pair.

The new Taylor declaration is, of course, consistent with the Carroll declaration. If the information in Warden Carroll's declaration is true, it is necessarily true that Taylor could not have handed out "Pro-Ked Dude" shoes to Cooper. Taylor's new declaration states that he did not, in fact, hand out such shoes.

III. OTHER EVIDENCE

Once a *Brady* violation has been established, a federal habeas court is required to evaluate all information in the case, not just information relevant to the *Brady* violation. Other evidence in the case suggests that about three Caucasian or Mexican men, rather than Cooper, might have committed the murders. Such evidence includes initial statements of Josh Ryen in the hospital, who stated that three or four men committed the murders, and that the men did not have black or brown skin. While still in the hospital, Josh Ryen saw a picture of Cooper on television and stated that

he was not one of the men. Josh Ryen identified Cooper at trial as the murderer, but his earlier statements are inconsistent with this identification. Jessica Ryen was found with numerous strands of blond or light brown hair clutched in her hand. Cooper, an African-American, could not be the source of the hair. That hair has not been tested, despite a request by Cooper.

Diana Roper has earlier supplied a sworn declaration that her then-boyfriend, Lee Furrow, came home late on the night of the murders without a t-shirt he had ***1123** been wearing earlier in the day. He wore, instead, blood-spattered coveralls, which he took off and left at the house with Roper. Five days later, Roper turned the coveralls over to police, but the police threw the coveralls away without testing them and without alerting Cooper's counsel to their existence. Further, Kenneth Koon confessed to a fellow inmate, with whom he was smoking marijuana in prison, that he and two other men had committed the Ryen/Hughes murders. According to the inmate who reported the conversation, Koon said they had gone to the Ryen house to "collect a debt" but had "hit the wrong house." Koon said that two of the men went afterwards to his "old lady's house" to leave bloody coveralls. Koon had previously been romantically involved with Roper.

A bloody t-shirt and a blood-stained hatchet were found beside the road, in separate locations, after the murders. Roper states in her declaration that Furrow's hatchet was missing, and that the murder weapon had the same distinctive handle as Furrow's

hatchet. Roper further states that she is sure the recovered bloody Fruit-of-the-Loom t-shirt is the same shirt Furrow was wearing earlier on the day of the murders.

Finally, two declarations have been filed during the last day and a half from two women who were in a bar near the Ryens' house on the night of the murders. One of the declarations states that three men came into the bar, but that one of the three stayed in the background. The declaration states that the other two men "were very loud and obnoxious and behaved bizarrely." It says that one of the two had longer-than average "medium brown or dirty blond hair." The other man wore coveralls. The other declaration describes two blond men. Both declarations state that the front of the two men's clothing and faces were splattered with blood. The men spoke in a kind of gibberish and appeared to be under the influence of drugs.

There was, of course, evidence pointing to Cooper's guilt at trial. Salient among that evidence was a spot of blood taken from a hallway in the Ryen house, the bloody t-shirt, and a hand-rolled cigarette found in the Ryens' abandoned car in Long Beach. Pursuant to an agreement between Cooper and the State, all three of these pieces of evidence have been subjected to DNA testing. All three tests resulted in a positive match with Cooper's DNA. Despite this DNA evidence, Cooper continues to maintain his innocence.

Cooper requests that a further test be done on the bloody t-shirt to determine whether EDTA, a

preservative agent, is in that blood. If EDTA is present, Cooper maintains, that will show that his blood was placed on the t-shirt after the fact by someone who had access to his drawn blood. The State has refused to perform a test for EDTA.

IV. AUTHORIZATION TO FILE APPLICATION

We are not in a position fully to evaluate the strength of Cooper's *Brady* claim. Nor are we in a position to undertake the difficult task of evaluating the information derived from the *Brady* claim in light of the other evidence in the case, treating much of that evidence with the deference required for prior factfinding by the state courts. We hold only that Cooper has made out a prima facie case that entitles him to file a second or successive application. A prima facie showing on one claim in a second or successive application permits an applicant to "proceed upon his entire application in the district court." *Woratzeck*, 118 F.3d at 650.

***1124 * * ***

This case centers on Cooper's claim that he is innocent. No person should be executed if there is doubt about his or her guilt and an easily available test will determine guilt or innocence. Cooper has asked specifically that two tests be done.

First, Cooper asks that the blood on the t-shirt be tested for the presence of the preservative EDTA. The presence of such a preservative would show that his blood was not on the t-shirt at the time of the

killings, but was rather placed there at some later time.

Second, Cooper asks that the blond or light brown hair in Jessica Ryen's hand be subjected to mitochondrial DNA testing. Such testing, if favorable to Cooper, would exclude other members of the Ryen family and Chris Hughes as sources of the hair. It could also positively identify Lee Furrow, and perhaps others, as the killer or killers, if those men can now be located.

In his brief to us, Cooper states, "Through readily available mitochondrial testing of blond hairs found in one of the victim's hands, and testing for the presence of the preservative agent EDTA on a T-shirt[ ] the State belatedly claimed contained Mr. Cooper's blood, the question of Mr. Cooper's innocence can be answered once and for all."

The district court may be in a position to resolve this case very quickly. As soon as Cooper's application is filed, it should promptly order that these two tests be performed in order to evaluate Cooper's claim of innocence.

In accordance with the foregoing, we authorize Cooper to file his second or successive application for habeas corpus in the district court. We order Cooper's execution stayed pending the resolution of that application.

IT IS SO ORDERED.

SILVERMAN, CIRCUIT JUDGE, WITH WHOM RAWLINSON, CIRCUIT JUDGE, JOINS, CONCURRING IN PART AND DISSENTING IN PART.

Cooper is either guilty as sin or he was framed by the police. There is no middle ground.

Cooper asserts a freestanding claim of actual innocence. In *Herrera v. Collins*, 506 U.S. 390, 393, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the Supreme Court held that a freestanding claim of actual innocence based on newly discovered evidence was not a ground for habeas corpus relief. *See also Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002). However, the Supreme Court assumed, without deciding, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417, 113 S.Ct. 853. The Court noted that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.*; *see also Schlup v. Delo*, 513 U.S. 298, 315-16, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). We have held that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997) (rejecting a *Jackson v. Virginia* modified sufficiency of the evidence test for such claims); *see also Turner*, 281 F.3d at 872; *Jackson v. Calderon*, 211 F.3d 1148, 1164 (9th Cir. 2000), *cert. denied*,

531 U.S. 1072, 121 S.Ct. 764, 148 L.Ed.2d 665 (2001).

Everything comes down to the bloody t-shirt. At trial, the prosecution presented no evidence that the t-shirt contained Cooper's blood. Cooper subsequently sought DNA testing to show that he did not commit*1125 the murders. DNA testing established that the shirt contained Cooper's blood and the blood of one or more of the victims. This is very damning evidence, but Cooper contends that his blood was planted on the shirt by law enforcement officers. If the blood was planted, he says, it will reflect a high level of EDTA, a preservative agent contained in the vial in which the blood was stored. A high level of EDTA will show that the blood came from the vial rather than directly from him, proving that the police tampered with evidence in an effort to frame him. Conversely, if the blood is *not* contaminated by EDTA, the shirt conclusively proves his guilt. As Cooper himself puts it, "the question of Mr. Cooper's innocence can be answered once and for all."[1]

Since Cooper's guilt can be quickly and definitively determined by means of a simple test, there is no reason not to have it performed prior to his execution. I would hold in abeyance Cooper's application to file a second or successive petition, and I would order the parties to promptly arrange for the testing of the shirt. I would stay his

---

[1] Cooper represents to the court that his next-of-kin intends to obtain the t-shirt and test it for EDTA even if the execution goes forward.

execution in the meantime. The public cannot afford a mistake. Neither can Cooper.

TALLMAN, CIRCUIT JUDGE, WITH WHOM CIRCUIT JUDGE BYBEE JOINS, DISSENTING FROM EN BANC STAY ORDER.

Because the court acts to stay the execution of Kevin Cooper in derogation of the standard set by Congress for evaluating successive habeas corpus petitions, I respectfully dissent. We do not apply the familiar standards as if this case were on direct or collateral review. The court ducks the question whether the standard announced in *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1994), has been superceded by AEDPA. The majority finds that, under either standard, Cooper has made his case for a successive habeas petition. With the greatest respect for the concerns expressed by my colleagues in the majority, I disagree.

For successive appeals like this, 28 U.S.C. § 2244(b)(2) controls:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in the light of the evidence as a

> whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Applying this standard, the panel majority (Circuit Judges Rymer and Gould) carefully evaluated the merits of Cooper's eleventh hour attempt to delay the imposition of his sentence in this 21-year-old case. *See* Order entered 2/08/04.

Under § 2244(b)(2)(B)(i), Cooper must establish that the factual predicate for any constitutional claim "could not have been discovered previously through the exercise of due diligence." He has not met this burden. With regard to Cooper's *Brady* claim concerning the prosecution's alleged failure to inform the defense of the Chino warden's information concerning the general availability of the Pro-Ked shoes, the proper test under § 2244(b)(2)(B)(i) is ***1126** whether this information was available upon the exercise of due diligence. The warden's declaration explicitly states that she was ready and willing to share this information with the defense. The fact that the warden only recently came forward with this information is not dispositive under § 2244(b); the defense's utter failure to independently investigate the issue evinces a lack of diligence.

Even if Cooper could meet the (B)(i) due diligence standard, he has not made a prima facie showing of a constitutional violation. *See* 28 U.S.C. §§ 2244(b)(2)(B)(ii), (b)(3)(C). The majority cites the

standard set forth in *Schlup v. Delo*, finding that had the warden's information been provided to the defense and presented at trial, it is "more likely than not" that a reasonable factfinder would not have found Cooper guilty. Although we have not specifically addressed and resolved the question of *Schlup's* applicability post-AEDPA, I believe that *Schlup's* "more likely than not" standard is irreconcilable with the "clear and convincing" standard of AEDPA. Cooper has failed to show that the facts offered, "if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). Therefore, he does not satisfy the stringent statutory requirements for filing a successive habeas petition. *See David v. Hall*, 318 F.3d 343, 347 n. 5 (1st Cir. 2003); *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002); *In re Minarik*, 166 F.3d 591, 600 (3d Cir. 1999).

Even assuming for purposes of this argument that *Brady* information was withheld, Cooper cannot satisfy the § 2244(b)(2)(B)(ii) standard because *Brady* is not violated unless the information withheld is material. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). First, the best evidence is not the warden's hearsay, but the testimony introduced by the state at trial. Contrary to the majority's reading of the warden's affidavit, she did not state that tennis shoes issued at Chino were different from tennis shoes issued at other prisons. Rather, she stated

that "the notion that the shoeprints in question likely came only from a prison-issue tennis shoe was inaccurate." At Cooper's trial, the key footwear-related evidence was the testimony of the Stride Rite shoe company representative, who testified that Pro-Ked Dude shoes were sold exclusively to state institutions and that the tread on the soles of these shoes were unique to his brand. Additionally, James Taylor, an inmate at Chino, testified that he issued a pair of black Pro-Ked Dude shoes to Cooper shortly before Cooper escaped. Although the warden's information contradicts the representative's and Taylor's testimony, there is no reason to believe that the warden was in a better position than the Stride Rite representative to opine on the distribution of Pro-Ked Dude shoes in prisons, or that she could contradict Taylor's testimony that he, in fact, issued Cooper a pair of these shoes. Because the warden's research consisted merely of asking prison personnel about the availability of this brand of shoes, her recent declaration does not undercut the evidence offered at trial.

Even if the warden's claim was completely credited-that the Pro-Ked shoes issued to prisoners at Chino could be purchased generally-it does not undermine the key evidence the jury heard. The critical fact is that the same shoe pattern prints were found inside the Ryen house (where the murders occurred), just outside the Ryen house, and in the Lease house (where Cooper indisputably stayed). Whether these shoes were available to the general public or only to prison inmates, ***1127** the same prints were found in both homes. Viewed against the evidence as a whole, the information that

Cooper now urges is not sufficient to establish by clear and convincing evidence that, but for the alleged constitutional errors, no reasonable jury could have concluded that he was guilty even if the warden's information had been available to the defense at trial. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). Indeed, we could not conclude even under *Schlup* that Cooper's evidence is sufficient to justify yet another round of habeas review. As Justice O'Connor observed in *Schlup*,

> "[A] petitioner does not pass through the gateway erected by *Murray v. Carrier*, 477 U.S. 478 [106 S.Ct. 2639, 91 L.Ed.2d 397] (1986), if the district court believes it more likely than not that there is any juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt."

513 U.S. at 333, 115 S.Ct. 851 (O'Connor, J., concurring).

The majority further finds that Cooper has met the extraordinarily high burden under AEDPA for bringing an evidence tampering claim in a successive petition. Cooper's claim that the bloody T-shirt was tampered with is, at its core, the same claim he raised at trial and at every proceeding since trial. He has repeatedly contended that the San Bernardino County Sheriff's Office and crime lab employees tampered with and manipulated evidence. The portion of the t-shirt that matched Cooper's DNA was in the continuous possession of the state superior court since the trial. Accordingly, the

contamination would have to have occurred before trial and before the advent of forensic DNA testing. Therefore, as far as we know, the state never received the benefit of any such conspiracy to tamper with evidence. At trial, the state only contended that the stain belonged to victim Doug Ryen.

As the panel noted, the state trial court determined at the evidentiary hearing that "Cooper's claims lacked merit." The panel also accurately stated, "We resolved in connection with Cooper's motion for a second habeas corpus petition that nothing claimed about the DNA testing satisfies the requirements for a second or successive application." More than one court has reviewed this evidence tampering claim and found it unpersuasive. In his application, Cooper fails to present any newly discovered facts sufficient to justify allowing him to bring the successive petition.

Regarding the Slonaker and Mellon-Wolfe declarations, the defense fully explored at trial the issue of who was present at the Canyon Corral Bar and what occurred there on the night of the murders. Edward Lelko, the bartender at the Canyon Corral Bar that night who had come forward the next day on his own volition to tell the police what he had seen, was called by the defense at trial. He, at no point, testified or reported to police that the suspicious patrons were spattered with blood. Furthermore, the prosecution called Shirley Killian, the manager of the Canyon Corral Bar, who testified that the men had close-cut military-type haircuts and wore light-colored t-shirts. She noticed no blood or stains on their shirts or clothing. It is

inconceivable that two witnesses who saw these men-one called by the defense, and the other by the prosecution-would not have noticed it. Accordingly, none of this information would be sufficient, even if proven, to establish by clear and convincing evidence that no reasonable juror could have found Cooper guilty. At best, he has discovered additional evidence for impeachment, but not to establish actual innocence.

Furthermore, the majority fails to appreciate the powerful circumstantial evidence tying Cooper to these crimes. Lost ***1128** in defense counsel's voluminous pleadings with which we have been inundated over the past two days are a number of crucial facts. As noted above, the same shoe impression was found inside the Ryen house, just outside it, *and* in the Lease house. The evidence is undisputed that Cooper was the only suspect inside the Lease house. There are no other shoe prints.

Also conspicuous by its absence is any mention by the defense that a red-stained button, identical to those worn on prison-issue field jackets, was found in the bedroom of the Lease home where Cooper admits he was hiding out and where he apparently showered after the murders. Luminol tests showed the presence of blood on the shower wall and Cooper's foot print was found on the sill of the shower. Long before any DNA testing was conducted, blood evaluation by the crime laboratory of the bloody spot on the wall of the Ryen murder scene showed characteristics attributable to African Americans. No other suspect that Cooper now offers in variations of his defense theory that someone else

murdered the Ryen family and their young guest is African-American.

After careful, thoughtful, and thorough consideration of this procedurally and factually byzantine case, the panel correctly determined that Cooper fails to satisfy AEDPA's stringent standard for bringing a successive habeas petition. This is not the "extraordinary case" justifying a stay of execution based upon a claim of actual innocence. *Schlup*, 513 U.S. at 321, 115 S.Ct. 851. Because the panel was correct, I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS,

NINTH CIRCUIT

KEVIN COOPER,
PETITIONER-APPELLANT
v.
JILL BROWN, CALIFORNIA
STATE, PRISON AT SAN QUENTIN,
RESPONDENT-APPELLEE.

No. 05-99004.

May 11, 2009.

ORDER

The panel has voted to deny the Petition for Rehearing and Petition for Rehearing En Banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to hear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

WILLIAM A. FLETCHER, Circuit Judge, dissenting from denial of rehearing en banc, joined by PREGERSON, REINHARDT, PAEZ, and RAWLINSON, Circuit Judges:

The State of California may be about to execute an innocent man.

From the time of his initial arrest until today, Kevin Cooper has consistently maintained his innocence of the murders for which he has been convicted. Cooper was convicted of capital murder and sentenced to death by a California court in 1985. The California Supreme Court affirmed Cooper's conviction and sentence in 1991. *People v. Cooper*, 53 Cal.3d 771, 281 Cal.Rptr. 90, 809 P.2d 865 (1991). The California Supreme Court denied Cooper's state petition for habeas corpus in 1996. A three-judge panel of the Ninth Circuit affirmed the denial of Cooper's first federal application for habeas corpus in 2001. *582*Cooper v. Calderon*, 255 F.3d 1104 (9th Cir.2001). That decision was called en banc, but the call failed.

In 2004, on the eve of his scheduled execution, Cooper sought permission from the three-judge Ninth Circuit panel to file a second or successive application for federal habeas corpus under 28 U.S.C. § 2244(b)(3)(A). Among other things, Cooper claimed that he had new and previously unavailable evidence that the State had violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* requires the State to turn over exculpatory information to a criminal defendant. Based on the claimed *Brady* violation,

Cooper claimed actual innocence under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), and § 2244(b)(2)(B)(ii). The three-judge panel denied permission, but an en banc panel of the Ninth Circuit reversed. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir.2004) (en banc). We stayed Cooper's then-pending execution until his new federal habeas application could be addressed.

Two days before the murders, Cooper had escaped from the minimum security section of a nearby California state prison by walking across an open field. Shortly before Cooper's scheduled execution date, Midge Carroll, the now-retired warden of the prison, provided a sworn declaration in which she stated that she had learned from her staff that shoes issued to prisoners "were not prison manufactured or specially designed prison-issue shoes," but, rather, were "common tennis shoes available to the general public through Sears and Roebuck and other such retail stores." Carroll stated that she had learned this information during the investigation and conveyed it to investigators before the trial. This information would have been critical to Cooper's defense, for a key to the prosecution's case at trial was that identical shoeprints at the crime scene and in the house where Cooper had been staying were made by Pro-Ked "Dude" tennis shoes, and that these shoes were distributed only to prisons and other institutions. Warden Carroll's information, though clearly exculpatory, had not been provided to Cooper prior to trial.

In granting permission to file a second or successive application, the en banc panel noted,

"Once a *Brady* violation has been established, a federal habeas court is required to evaluate all information in the case, not just information relevant to the *Brady* violation." *Cooper*, 358 F.3d at 1122. That is, everything in the new habeas application was properly before the district court. *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir.1997) (per curiam) ("If [a petitioner's] application makes a prima facie showing as to one of the claims, he may proceed upon his entire application in the district court."). In addition to this general instruction to the district court, we specifically directed that two tests be performed. We wrote, "As soon as Cooper's application is filed, [the district court] should promptly order that these two tests be performed in order to evaluate Cooper's claim of innocence." *Cooper*, 358 F.3d at 1122.

First, we directed the district court to conduct further testing of a bloody tan t-shirt that had been found beside the road leading away from the house where the murders took place. The tan t-shirt was found soon after the murders. Initial testing of stains on the t-shirt showed that they contained blood consistent with one of the victims and not consistent with Cooper. Cooper presented evidence of the t-shirt as part of his defense at trial. 12/6/84 RT 4602-06, 4608; 1/15/85 RT 6508-11.[1]

---

[1] Citations to the reporter's transcripts of the trial and hearings appear with the date of the proceeding, the letters "RT," followed by the page number. Citations to the Excerpts of Record, compiled for purposes of this appeal, use the abbreviation "ER" followed by the page number. "FER" refers to the Further Excerpts of Record.

*583 Long after trial, at Cooper's insistence, the State performed a DNA test on some of the blood on the t-shirt. Cooper maintained that the test would prove his innocence. Instead, the blood tested positive for Cooper's DNA. Cooper maintained (and continues to maintain) that his blood was planted on the t-shirt. If the blood was planted, the only possible source was blood taken from Cooper by law enforcement authorities. A vial of blood was taken from Cooper by San Bernardino County Sheriff's Department (SBCSD) personnel on August 1, 1983, two days after his arrest. That blood contained an added preservative called EDTA. We wrote, "The presence of such a preservative would show that [Cooper's] blood was not on the t-shirt at the time of the killings [.]" *Cooper*, 358 F.3d at 1124. We directed the district court to test Cooper's blood on the t-shirt for the presence of EDTA.

Second, Jessica Ryen, one of the murder victims, was clutching blond or light brown hair in her hand. We directed the district court to subject the hair to mitochondrial DNA testing.

The district court held hearings on Cooper's application for habeas corpus in 2004 and 2005. It denied all relief. *Cooper v. Brown* ("Dist.Ct."), No. 04-656 (S.D.Cal. May 27, 2005).[2] A three-judge panel of our court affirmed, with one judge concurring

---

[2] The district court's order in this case is published as an appendix to the panel's opinion, *Cooper v. Brown*, 510 F.3d 870, 887-1004 (9th Cir.2007). I refer to the pagination of the district court's order as it appears in that appendix.

specially. *Cooper v. Brown*, 510 F.3d 870 (9th Cir.2007).

There is no way to say this politely. The district court failed to provide Cooper a fair hearing and flouted our direction to perform the two tests.

As will be described in greater detail below, the district court impeded and obstructed Cooper's attorneys at every turn as they sought to develop the record. The court imposed unreasonable conditions on the testing the en banc court directed; refused discovery that should have been available as a matter of course; limited testimony that should not have been limited; and found facts unreasonably, based on a truncated and distorted record.

The most egregious, but by no means the only, example is the testing of Cooper's blood on the t-shirt for the presence of EDTA. As will be described in greater detail below, the district court so interfered with the design of the testing protocol that one of Cooper's scientific experts refused to participate in the testing. The district court allowed the state-designated representative to help choose the samples to be tested from the t-shirt. The court refused ***584** to allow Cooper's scientific experts to participate in the choice of samples. Indeed, the court refused to allow Cooper's experts even to *see* the t-shirt. The state-designated lab obtained a test result showing an extremely high level of EDTA in the sample that was supposed to contain Cooper's blood. If that test result was valid, it showed that Cooper's blood had been planted on the t-shirt, just as Cooper has maintained.

A careful analysis of the evidence before the district court strongly suggests that the result obtained by the state-designated lab was valid. However, the court allowed the state-designated lab to withdraw the test result on the ground of claimed contamination in the lab. The court refused to allow any inquiry into the alleged contamination. The court refused to allow Cooper's experts to review the bench notes of the state-designated lab. The court then refused to allow further testing of the t-shirt, even though such testing was feasible.

The district court placed two photographs of the murder victims at the end of its 159-page order denying relief to Cooper. One is a photograph of the photogenic Ryen family-two beautiful children, ten-year-old brown-haired Jessica and eight-year-old blond-haired Josh, and their attractive parents. The other is a photograph of eleven-year-old Chris Hughes, a handsome blond-haired boy. The district court had no analytic reason to include these photographs at the end of its order.

I. BACKGROUND

Late at night on June 4, 1983, Doug and Peggy Ryen, their daughter Jessica, and their houseguest Chris Hughes, were brutally murdered in the Ryen home in Chino Hills, California. Their son, eight-year-old Josh, suffered extensive injuries but survived. The victims had numerous chopping, cutting and stabbing injuries, caused by several different kinds of weapons. A number of cutting and stabbing wounds were inflicted after the victims were already dead. Josh was found in the late

morning of June 5 in his parents' bedroom, near the bodies of his mother and Chris. His father's body was also in the bedroom. His sister's body was in an adjoining hallway.

Two days earlier, Kevin Cooper, a black man, had escaped from the minimum security section of the nearby California Institute for Men (CIM) at Chino by walking across an open field. He had been serving a four-year sentence for burglary. Cooper hid out for those two days in a vacant house owned by Larry Lease (the "Lease house"), 125 yards from the Ryen house. The State's theory, at trial and now, is that Cooper acted alone in killing the four victims and in nearly killing Josh, and that Cooper committed the murders to facilitate his escape.

Cooper made several telephone calls from the Lease house, seeking money and other assistance from two women friends. The women refused to provide money or other help. Money in plain view on the kitchen counter of the Ryen house was untouched. Credit cards and money in Peggy Ryen's purse were also untouched.

The last of Cooper's telephone calls from the Lease house was completed at 8:30 p.m. on June 4, the night of the murders. Cooper testified that he waited until dark, finished his telephone call, left the house on foot immediately after the call, and hitchhiked to Mexico. There is undisputed evidence that Cooper registered at a hotel in Tijuana at 4:30 p.m. on June 5. When Cooper checked into that hotel, his hair was braided, as it had been when he escaped from prison. ER 3252, 3260. The Ryens'

white wood-paneled station wagon had been parked in the driveway of the Ryen house, with the keys in the ignition, throughout the entire evening of June 4. On June 11, the Ryens' station wagon was discovered in the parking lot of a Long Beach church, where it had been for several days. Tijuana is 125 miles south of the Ryen house. Long Beach is 45 miles west of the Ryen house.

A. EVIDENCE POINTING TO OTHER KILLERS

There is substantial evidence that three white men, rather than Cooper, were the killers. Some of the evidence was introduced at trial. Some of the evidence, even though exculpatory, was deliberately destroyed by the SBCSD and was therefore not available for use at trial. Some of the evidence, even though exculpatory, was *585 concealed from Cooper and therefore not available for use at trial.

Josh Ryen, the only survivor of the attack, first communicated to SBCSD Deputy Sharp that the murderers were three white men. ER 1278-79, 1386-87. This statement was the likely source of an entry in the police log during the afternoon of June 5, stating that the suspects were "three young males" driving the Ryens' white station wagon. ER 3688.

On the night of the murders, a couple drove to Chino Hills from Los Alamitos (about 37 miles away) after the night horse races to drop off a horse trainer. As they were leaving the trainer's driveway, they had to wait for a car driving rapidly down Carbon Canyon Road from the direction of the Ryen

house. The husband, who was driving, testified at trial that he stopped to wait for the car to pass. He stated that the car was a "light color" station wagon with a luggage rack. ER 1375-76. With some coaxing from Cooper's attorney, he admitted that shortly after the episode he had described the driver to SBCSD Lieutenant Knadler as a "young white male." The wife, who was a passenger, described the car as "tan" or "cream" colored, with "wood grain" paneling. She thought the car had a luggage rack. She "remembered thinking" that she saw three or four people in the car. ER 1379. The Ryens' station wagon was white with wood paneling and a luggage rack.

The injuries to the victims were consistent with the use of multiple weapons. The number of victims, and the number and nature of the wounds, led the coroner initially to conclude that there was more than one killer. ER 1367-69; see also ER 3148-56.

When Josh was in the hospital after the murders, he twice saw a picture of Cooper on television. Both times he indicated that Cooper was not one of the killers.

On June 7, SBCSD Deputy Field recovered a blood-stained tan, medium-size, Fruit of the Loom t-shirt with a front pocket beside Peyton Road, not far from the Ryen house and the Canyon Corral Bar. ER 1575. The characteristics of the blood on the t-shirt were consistent with Doug Ryen's profile and inconsistent with Cooper's profile. ER 1757-61; 1/15/85 RT 6508-13. Post-trial DNA testing, conducted at Cooper's insistence, revealed that the

shirt contained DNA consistent with Doug Ryen and possibly Peggy Ryen. ER 800. Post-trial DNA testing also revealed that at least one blood stain on the t-shirt contained Cooper's DNA. I discuss the presence of Cooper's DNA on the t-shirt in greater detail below.

As will be described in more detail below, a woman named Diana Roper provided a statement in 1983 and again in 1998 describing an identical tan Fruit of the Loom t-shirt with a front pocket that she had purchased for her then-boyfriend, Lee Furrow. On both occasions, Roper stated that Furrow was wearing the t-shirt on the evening of June 4. ER 1571, 1573.

At the time of the murders, Lee Furrow was living with Roper in Mentone, approximately 45 miles east of Chino Hills. ER 1570, 1592, 3142; 10/22/84 RT 2266. Furrow had previously been convicted of strangling Mary Sue Kitts in 1974, on the orders of Clarence Ray Allen. ER 1594, 1789-90, 1802; 10/22/84 RT 2266. Furrow had been a member of the "Allen gang," and he testified for the prosecution at Allen's capital murder trial. See *Allen v. Woodford*, 395 F.3d 979, 986, 991 (9th Cir.2005); *People v. Allen*, 42 Cal.3d 1222, 1236-38, 232 Cal.Rptr. 849, 729 P.2d 115 (1987). Allen was executed in 2006. In return for his testimony, Furrow was allowed to plead guilty to second degree *586 murder. He served four and a half years in prison.

Furrow was released from prison on June 12, 1982, a year before the Ryen-Hughes

murders. In a 1998 sworn affidavit, Roper stated that Furrow had "confided" in her that he "dismembered [Kitts'] body and threw the body parts in the Kern River." ER 1570. Kenneth Koon, another acquaintance of Furrow's, confirmed that he learned that Furrow "killed a girl, cut her up, threw her in the Kern River." Kenneth Koon Interview, Apr. 7, 2004, Docket No. 31, Ex. 55, at 4.

On June 4, the day of the murders, Furrow, Roper, Roper's sister Karee Kellison, and neighbors Michael and Rebecca Darnell, attended the U.S. Festival Country Show at the Glen Helen Amphitheater approximately 30 miles northeast of Chino Hills and 24 miles northwest of Mentone. See Answer, Docket No. 30, Ex. 36; see also ER 1786. That afternoon, Furrow picked up Michael Darnell from the county jail, where he had been held overnight. Answer, Docket No. 30, Ex. 39. ER 1786. According to Darnell, he and Furrow arrived at the festival after dark. Answer, Docket No. 30, Ex. 40 at 9, 16. Debbie Glasgow, who was having an affair with Furrow, told police that Furrow arrived at the festival at approximately 11 p.m. Answer, Docket No. 31, Ex. 53. Rebecca Darnell recalled that she left the festival with her husband, and with Roper and Roper's sister, but that Furrow did not leave with them. Answer, Docket No. 31, Ex. 41 at 1.

In her 1998 affidavit, Roper stated:

> On Saturday afternoon June 4, 1983, Lee [Furrow] and I were at our home getting ready to go to the U.S. Festival.... He was wearing a medium size Fruit of the Loom

beige T-shirt which had a pocket on the front. I bought Lee the T-shirt at K-Mart before June 4, 1983. I also recall telling the sheriff's department fifteen years ago virtually the same thing regarding Lee's T-shirt....

During the early morning hours of June 5, 1983, my sister Karee Kellison, and I had returned from the U.S. Festival and were in the living room at my house in Mentone. I received a telephone call from Lee about 1:30 a.m. to 2:00 a.m. in the morning of June 5, 1983, asking me to come get him and Debbie Glasgow at the U.S. Festival. I refused and hung up the telephone. A few hours later a car pulled into our driveway. My sister, Karee, walked to the French doors to look out. I did not look out. A few moments later Lee and Debbie walked through the front door. They were in a hurry. I heard the car depart. Lee was wearing long sleeve coveralls which had a zipper in the front. The coveralls were splattered with blood and there was horse hair and dried horse sweat on the lower leg area. He did not have the beige T-shirt or Levis on that he was wearing earlier in the day. Lee walked to the back of the house and seemed to be in a hurry. Lee took the coveralls off and left them on the floor of the closet. After he changed his clothes, Lee and Debbie left immediately on his motorcycle. Lee and Debbie were not in the house for

more than five minutes and were obviously in a big hurry to leave.

After I learned of the Ryen/Hughes murders in Chino I turned the coveralls over to the San Bernardino County Sheriff's Department. I told the deputy the facts about how I found the coveralls and that Lee Furrow may be the murderer.

A few days after the murders I saw Lee at my neighbors house.... I told Lee I turned the bloody coveralls over *587 to the sheriff's department. Lee became furious that I had turned them in. Lee had changed his appearance by cutting most of his hair off and trimmed his sideburns and his "Fu-Manchu" moustache....

Also, a few days after the murders I heard on the news that a hatchet was found near the crime scene in Chino. I immediately walked to the washer area of our house. Lee's hatchet was missing. All of his other tools were still hanging on the wall. [Referring to a photograph of the hatchet found near the crime scene]: The hatchet in this picture looks like the hatchet ... which I found missing after the Ryen/ Hughes murders. I cannot say for sure it is the same hatchet that Lee owned but the curvature of the handle is the same. Even more striking in similarity than the curvature of the handle is the style of the handle, which has sort of an American Indian pattern to it.

> [Referring to a photograph of the bloody tan Fruit of the Loom t-shirt recovered near the Ryen house]: The T-shirt in this photograph looks exactly like the T-shirt Lee was wearing on June 4, 1983 including the manufacturer, the size, the color and the pocket. I am absolutely positive the photograph of this T-shirt matches the T-shirt that Lee was wearing at our house on the afternoon of June 4, 1983.

ER 1571-73. The substance of Roper's 1998 affidavit matches the substance of a May 1984 interview she gave to SBCSD Detective Steelmaker. In the interview, Roper told Detective Stalnaker that she had been under the influence of drugs on the night of June 4. ER 1588-97.

In a separate November 1998 sworn affidavit, Roper's sister Karee Kellison confirmed many of the details of Roper's story. She added a detail about the car in which Furrow and Glasgow arrived. She stated:

> ... During the early morning hours of June 5, 1983, [Diana and I] were in the living room talking when we heard a car pull in the driveway. I would estimate the time after 3:00 a.m. but before sunrise. I looked out the window in the French doors and I saw Lee and Debbie get out of a car. There was not sufficient light to identify who the other occupants in the car were. However, there was enough light to see that it was a station wagon, kind of brown in color.

...

> Lee and Debbie came in the house. Lee was wearing long sleeve coveralls, which were splattered with blood. Lee walked to the back of the house and changed his clothes. When he came out of the bedroom he was no longer wearing the coveralls and apparently left them in the back of the house. Lee and Debbie left immediately on his motorcycle....
>
> A week or so after the Ryen/Hughes murders I was interviewed by the police. I never told them the above information because I am terrified of Lee Furrow and Debbie Glasgow. I don't recall what I told the police but I know that I did not tell them what I saw for fear of what Lee and Debbie would do to me. While I am still scared to death of Lee, I understand he is in Pennsylvania and Debbie is dead.

ER 3116-17.

On June 9, Roper examined the coveralls that Furrow had left at her house on the night of the murders. She called her father, who then called the SBCSD. ER 1591, 4895. According to SBCSD Deputy Eckley, who was dispatched to Roper's house, the coveralls were "[h]eavily splattered" with blood. ER 1578. Deputy Eckley took the coveralls into evidence *588 and gave a report to his supervisor. ER 1582. Deputy Eckley's report, dated June 10, 1983, stated that Roper "suspects that the bloody coveralls are from the Chino murders and has

further information regarding that incident and/or possible suspect/s." ER 3105. As will be recounted in more detail below, Deputy Eckley discarded the coveralls in a dumpster during Cooper's preliminary hearing in his capital case. Deputy Eckley claimed at trial that he acted alone in destruction of the bloody coveralls. However, the initials "KS" on the Disposition Report for the coveralls indicate that Senior SBCSD Deputy Ken Schneckengast approved the destruction. The State did not provide the Disposition Report to Cooper's attorneys until long after trial. There is no evidence that anyone in the SBCSD ever performed tests on the blood on the coveralls.

Deputy Eckley had had prior experience with Diana Roper and Karee Kellison, as well as with their father, Bill Kellison. Deputy Eckley's prior experience caused him to take seriously the coveralls and Roper's story. In an audiotaped interview with Cooper's investigator, Deputy Eckley stated, "[W]ith my relationship with the Kellison's/Roper family I know their involvement in crime, as far as committing murders as well as giving up murderers.... [T]hey've given very good information on a murder before." ER 5000-01.

Roper and Furrow separated immediately after the murders. Roper then began living with Kenneth Koon. ER 1592-93. In November 1984, Koon was incarcerated at the California Medical Facility at Vacaville. According to Anthony Wisely, another inmate at Vacaville, Koon confided in Wisely while they were in lockdown smoking marijuana. SBCSD Detective Woods interviewed Wisely on

December 19, 1984. Detective Woods stated in his report that Wisely was in prison "for a two-year period of time under the psychotic and remission program." ER 1601. Part of Wisely's story directly recounts the murders. Another part of the story matches Roper's story if Furrow's name is substituted for Koon's. According to Detective Woods' report:

> [Wisely said that Koon told him] that he was with two other guys that were in the BRAND or Arian [sic] Brotherhood and they [had] driven to the Chino area to collect a debt. He also stated that they had driven to a residence in Chino and that the two guys got out and that they were in for about ten or fifteen minutes and that one of the guys was carrying two axes or hatchets. That he also had gloves on, and that one of them made the statement that the debt was officially collected and that the first guy that came out turned around and said who was that, and then again stated "Who the fuck is the nigger?" He said that the man that made the statement was looking in the direction of the window and he saw a black subject through the window and the one subject told him to get out of there. He states that KOON was dropped off in San Bernardino somewhere, he does not know where. He stated that KOON went to his old lady's house and changed his overalls and that KOON also made the statement that one of the guys that came out with the axes was very upset

> because they apparently had left one kid alive.
>
> ....
>
> He stated that these persons that apparently collected the debt at the Ryen residence are debt collectors for the BRAND, the Arian [sic] Brotherhood, and that they have been to the pen for murder before and it also includes or involves someone that is currently on death row.
>
> *589 He also stated that KOON thinks that they hit the wrong house for the collection and that after all this blows over that the BRAND will take care of business in the right way.
>
> I asked WISELY about any details when they saw the black subject there in Chino. He stated he could not tell me any other details.
>
> ....
>
> ... I asked [Wisely] if the female's name, which KOON referred to as his old lady, was DIANNA [sic] ROPER. He said that it was.

ER 1599-1600.

Detective Woods interviewed Koon immediately after his interview with Wisely. Koon confirmed Wisely's account about the coveralls. However, he

clarified that it had been Furrow who had changed his coveralls at Roper's house. Woods wrote:

> I asked [Koon] if he knew a subject by the name of DIANNA [sic] ROPER. He stated that he did.... I asked him at that time does he recall an incident when she turned over some coveralls to Yucaipa authorities. He stated that he did. He stated the best of his recollection was that she found some bloody coveralls in a house apparently belonging to LEE FARRELL [sic] and this was directly after the murders were discovered in the Chino Hills. He stated that apparently the cops destroyed them or lost the coveralls and nothing else was ever heard of it.

In the interview with Detective Woods, Koon provided himself an alibi. He claimed that he had not gone to the music festival with Furrow and Roper. Woods wrote, "He stated that he was aware of that particular weekend with the country music but, however, he was in the Gorman, CA area, returning back to the San Bernardino area shortly thereafter." Koon told Detective Woods that he was not affiliated with the "Arian Brotherhood." He refused to answer further questions "about that Arian Brotherhood situation." ER 3114.

Even though Woods interviewed Wisely and Koon on December 19, the State did not provide the information to Cooper's attorney until the morning of January 2, the day Cooper was scheduled to take the stand at his capital trial. Cooper's investigator interviewed Wisely ten days later, on January 12.

According to the investigator, Wisely was "wary." He was initially unwilling to talk to the investigator, but finally said a little. The investigator reported:

> Wisely stated that the contact by the Det[ective] was the beginning of his troubles, that he has been "in the hole" ever since. He reported that he had not committed a violation, and he is in the hole without cause. He further stated that the state is worried about him[.] ... He then stated that he knew that Kevin Cooper did not do it, that "if you had been there & listened to him (Koon), you would know who did it" (or something close to those exact words).

ER 3119.

In 2004, when the district court was making its initial plans for mitochondrial DNA testing of the hairs in Jessica's hand, the California Deputy Attorney General informed the court that Furrow had retained an attorney. Through his attorney, Furrow declined to provide a hair sample. 6/2/04 RT 5. The Deputy Attorney General informed the court that Koon, on the other hand, "indicated he will provide whatever the Court would request, voluntarily." *Id.* at 5. According to Koon's story, as recounted to Wisely and recorded by Detective Woods, Koon stayed in the car while the other two men went inside with their axes. If this is true, Koon would of course ***590** have nothing to fear from providing a hair sample.

On the night of June 4, three men came into the Canyon Corral Bar, which is located near the Ryen house. Several employees testified at Cooper's trial that the men came into the bar sometime around 8 or 9 p.m., left, and returned later. Witnesses' estimates of the time of their return range between 11 p.m. and 1:00 a.m. See ER 3648. When the men returned, at least one of them was extremely inebriated. The bouncer, Ralph Land, did not testify at trial, but stated in a tape-recorded interview with Cooper's investigator in January 1984 that "two of them were really close-cut hairs and all that and then the other one had long, straggly like dirty, like I thought maybe they just a couple of Marines and they ran into an old buddy or something." ER 3616. The witnesses who testified at trial stated that all three of the men had close-cut military haircuts.

In 2004, the district court heard testimony from two women-Christine Slonaker and Mary Wolfe-who were in the bar on the evening of June 4 and were harassed by two or three men. These women, who had not previously provided testimony, remembered the evening in some detail. They testified in the district court that they were at the bar with a third friend, and that the friend was receiving unwanted attention from some men due to her low-cut blouse. Slonaker, a phlebotomist (a person who draws blood), noticed that the man who was most aggressive had blood all over him. 6/28/04 RT 7, 24-25. She stated that from a distance it looked like he was just dirty, but that as he got closer "it was clearly apparent that it was blood." *Id.* at 70. Slonaker only noticed two men, while Wolfe noticed three, but Wolfe also noted that the third man was

"pretty quiet and standoffish." *Id.* at 121-22. She also noticed that they were "definitely [wearing] tennis shoes[.]" *Id.* Wolfe stated that the man who was not wearing coveralls had "medium brown or dirty blond hair that was longer than average and tucked behind his ears." ER 3219. Wolfe also noticed that the man in the tan shirt had spots of blood on his shirt and a small bit of blood on his face. 6/28/04 RT 121-23. Wolfe recalled that at least one of the others was wearing coveralls partly zipped down. *Id.* at 121-22. The louder man in the coveralls also had blood on him. ER 3220. Slonaker noted that "they were saying really weird and gibberish kind of things.... They were kind of like their eyes were rolling in their head." 6/28/04 RT 23. When Slonaker told the man that he was covered in blood, he acted surprised and then his behavior changed. *Id.* at 24-25. Both women recalled that the men were asked to leave the bar. *Id.* at 72, 76, 79, 125.

Lance Stark, a regular at the bar, also testified for the first time in 2004. He described "a couple of young loud mouths" being rude to some women at the bar. 7/23/04 RT 20-21, 59. He also commented that the third man in the group was very quiet and not noticeable. *Id.* at 40. He described the men as scruffy looking or dirty looking, and he observed that one of the men looked like he had grease or mud on him. *Id.* at 22-24, 60, 62, 63. He recalls one of the women telling that man that he had something on him. *Id.* at 108-09.

Stark also testified that in early 2004 he was visited by someone he believed was associated with

law enforcement. He testified that a man in a white Crown Victoria (which is often a law enforcement vehicle) pulled in front of Stark's trailer, asked whether he was Lance Stark, told him it would be in his best interest not to talk about the Kevin Cooper case, and then drove off. *Id.* at 30-32. Stark testified ***591** that the car was distinctive because it had a computer sticking out from the dashboard. *Id.* at 32-34. This visit occurred soon after one of Cooper's investigators first visited Stark. *Id.* at 90. When Cooper's attorney met Stark after his encounter with the man in the white Crown Victoria, Stark said, "Well, I'm not sure if I should talk to you because I was told not to." *Id.* at 101. The district court denied Cooper's efforts to investigate what may have been witness intimidation. ER 4037-39, 4663-65.

B. EVIDENCE AGAINST COOPER AT TRIAL

It was undisputed at trial that Cooper walked away from the minimum security section of CIM in Chino on June 2. It was also undisputed that Cooper spent two days hiding in the Lease house, located about 125 yards from the Ryen house. Telephone records show that Cooper's last telephone call from the Lease house ended at about 8:30 p.m. on June 4, the night of the murders.

In addition to the above, the most important evidence against Cooper at trial was the following:

(1) Eyewitness testimony of Josh Ryen.

(2) A spot of blood on the hallway wall of the Ryen house that was consistent with Cooper's blood profile.

(3) A bloody shoeprint made by a Pro-Ked Dude shoe on a sheet in the master bedroom of the Ryen house, a matching shoeprint on a spa cover outside the Ryen house, and another in the pool room at the Lease house.

(4) Role-Rite prison-issue cigarettes and tobacco found in the Lease house and in the Ryens' abandoned station wagon. (5) A missing hatchet from the Lease house, and a hatchet sheath found on the floor of a bedroom in the Lease house.

(6) A button found in the Lease house that matched a prison-issue jacket. (7) An empty beer can in the field between the Ryen house and the Lease house.

(8) Burrs on Jessica Ryen's nightgown.

(9) Positive Luminol tests in a shower in the Lease house.

I discuss each piece of evidence in turn.

1. EYEWITNESS TESTIMONY OF JOSH RYEN

At trial, the jury heard two recorded statements by Josh, one stating and one suggesting that he saw only one man on the night of the attack. However, when Josh first arrived at the hospital, he was able to communicate to a clinical social worker that the assailants were three or four young white males.

Deputies misrepresented his recollections and gradually shaped his testimony so that it was consistent with the prosecution's theory that there was only one killer.

2. A-41: THE SPOT OF BLOOD IN THE HALLWAY

A single drop of blood in the hallway outside the Ryen master bathroom-several feet away from any of the victims-had characteristics consistent with Cooper's genetic profile and inconsistent with the victims'. The crime lab conducted serological testing of this blood drop (entered into evidence as A-41) under suspicious circumstances. The criminologist who conducted the testing arrived at one result, and then altered his records to show a different result that conformed to Cooper's known blood characteristics. The drop of blood has a history of being "consumed" during testing and then inexplicably reappearing in different form for further testing when such testing would prove useful to the prosecution.

*592 3. PRO-KED DUDE SHOEPRINTS

Within the first few days after the murders, deputies discovered two distinctive matching shoeprints tying the crime scene to the Lease house. Later, a deputy in the crime lab discovered a bloody shoeprint on a bedsheet that had been collected from the Ryen master bedroom. At trial, the prosecution presented evidence that the shoe that likely made those shoeprints-a Pro-Ked Dude tennis shoe-was nowhere available for retail sale and was only

available through institutions such as CIM. The prosecution also presented evidence that Cooper had been issued such shoes at CIM.

The shoeprints on the sheet in the master bedroom of the Ryen house, on the spa cover outside the Ryen house, and in the Lease house were discovered after a suspicious delay. The shoeprint on the sheet was not discovered at the Ryen house, but rather in the SBCSD Crime Laboratory. Deputy Stockwell testified that he discovered the print after re-folding the sheet in the lab to match the way it supposedly had been folded, or crumpled, on the floor of the bedroom. 11/19/84 RT 3506-07. Deputy William Baird was the manager of the lab where the sheet was kept when the shoeprint was discovered. Baird provided critical testimony at trial connecting the shoeprint on the sheet to the shoeprint in the Lease house. He also testified that the shoeprints were made by Pro-Ked Dude shoes. ER 1676-77, 3195-3201. He testified that he already had a Pro-Ked Dude shoe in his lab, which he matched to the print on the sheet.

Pro-Ked Dude shoes were manufactured and distributed by Stride-Rite Corporation. Deputy Baird admitted at trial that he might have told the Stride-Rite official who testified at trial that the SBCSD wanted information from him so they could "shut down certain defenses." ER 3200. Soon after Cooper's trial, Baird was caught stealing heroin from the evidence locker at the Crime Laboratory. He stole the heroin both for his personal use and to sell to drug dealers. ER 1714-16.

Two additional facts discovered after trial render the shoeprint evidence particularly dubious. First, Pro-Ked Dudes were, contrary to the testimony at trial, available (though not in large quantities) at retail stores in the United States. Second, an inmate who testified at trial that he had issued Pro-Ked Dudes to Cooper shortly before his escape recanted his trial testimony in a sworn declaration supporting Cooper's application to file his second habeas application.

4. CIGARETTES AND TOBACCO

Cooper admitted to smoking "Role-Rite" prison-issue tobacco while he was in the Lease house. Tobacco consistent with Role-Rite was found on the floor between the front passenger seat and the front passenger door of the Ryens' station wagon. Two cigarette butts were also found in the station wagon, and blood typing tests could not exclude Cooper as the donor of the saliva on the butts. One of the butts contained tobacco that was consistent with the characteristics of the Role-Rite brand.

The station wagon was discovered in a parking lot in Long Beach, 45 miles west of the Ryen house, on June 11. When the station wagon was discovered, dust prints indicated that someone had recently closed the hood. ER 808-09. Cooper arrived in Tijuana, 125 miles south of the Ryen house, at 4:30 p.m. on June 5, the day after the murders, and stayed continuously at the same Tijuana hotel until June 8. 1/7/85 RT 5874. Cooper then went to Ensenada, Mexico, where he found work on a private boat. He worked on the boat from June 8 *593 until

the day of his arrest. 1/3/85 RT 5468-75. The station wagon was processed by the police under suspicious circumstances. Some cigarette butts from the Lease house were never processed into evidence. Some of those cigarette butts could have easily been planted in the car. Moreover, after initial forensic testing, paper from a hand-rolled cigarette butt supposedly found in the station wagon was described as consumed. That same paper later "reappeared" and was offered into evidence. When the paper "reappeared," it was significantly larger than the paper in the cigarette butt that had been tested.

5. THE MISSING HATCHET AND THE HATCHET SHEATH

On the day the bodies were discovered, detectives recovered a bloody hatchet beside the road not far from the Ryen house. People who had previously used the Lease house testified that a similar hatchet was now missing from the house. Investigators found a sheath for the hatchet in the Lease house near the closet in the bedroom previously used by Kathleen Bilbia ("the Bilbia bedroom"), where Cooper had slept on June 3. Fingerprint evidence strongly suggests that the hatchet sheath was planted in the bedroom soon after the hatchet was discovered. Further, the owners of the hatchet provided inconsistent testimony about the location of the hatchet before it disappeared.

6. THE CAMP JACKET BUTTON

Deputies discovered a green, blood-stained button near the closet in the Bilbia bedroom. It resembled

buttons found on certain "camp jackets" issued at CIM. The blood on the button was type A, consistent with Cooper and Doug Ryen. The green button was discovered under the same suspicious circumstances as the hatchet sheath, strongly suggesting it was planted in the Bilbia bedroom after Cooper had become a suspect. Further, its color showed that it came from a green prison-issued jacket. Uncontradicted evidence at trial showed that Cooper was wearing a brown or tan prison-issued jacket when he escaped.

7. THE EMPTY BEER CAN

In the refrigerator in the Ryen house, there was a six-pack of Olympia Gold beer with one can missing. Another can in the refrigerator, as well as the wall of the refrigerator, were smudged with reddish stains. Deputies found a stained, nearly empty can of Olympia Gold in the field between the Ryen house and the Lease house. The stain on the can in the field and on the wall of the refrigerator tested positive for blood. The blood stains on the beer cans were so degraded that the lab could not conduct any further tests, and deputies failed to collect the stain on the wall of the refrigerator as evidence. No one analyzed the contents of the nearly empty beer can.

8. BURRS ON JESSICA RYEN'S NIGHTGOWN

Two burrs adhered to the inside of Jessica Ryen's nightgown approximately ten inches up from the bottom hem. The prosecution argued to the jury that because the top of Jessica's nightgown did not have holes corresponding with some of Jessica's post

mortem chest wounds, at some point an assailant must have raised Jessica's nightgown, and, in the process of inflicting those chest wounds, deposited the burrs. The prosecution also presented evidence that similar burrs were found on the inside of the Ryen station wagon and on a blanket found in the closet where Cooper slept on June 3. Plants producing the burrs grew in the field between the Ryen house and the Lease house.

*594 The plant that produces the burrs is common in Chino Hills. It is a relative of alfalfa and is a common ingredient in horse and cattle feed. It is unusual for such burrs to transfer from one fabric surface to another. Once the burrs have adhered to a surface, typically they must be physically plucked in order to be removed. 2/4/85 RT 7483-85, 7576-77. Moreover, the coroner found a small beetle in Jessica's body bag. This beetle is nocturnal, suggesting that Jessica may have been outside during or soon before the murders, when she could have picked up the burrs.

9. POSITIVE LUMINOL TESTS IN THE SHOWER IN THE LEASE HOUSE

Detectives tested the shower and sink in the bathroom adjoining the Bilbia bedroom in the Lease house for traces of blood. Luminol testing revealed the possible presence of blood on the shower walls in a broad band from approximately two feet to five feet above the floor of the shower.

When Kathleen Bilbia moved out of the Lease house a short time before the murders, she had

cleaned her bathroom with bleach. Bleach reacts with Luminol in the same way that blood does. In order to exclude the possibility that a Luminol reaction is caused by bleach, rather than blood, a two-stage test is required. The evidence suggests that the detectives only conducted a one-stage Luminol test. Moreover, the staining pattern in the shower is not consistent with a person cleaning up after being covered in blood. The Luminol test did not indicate blood in the bottom portion of the shower, and it did not reveal patterns of drainage in the shower. One would expect the blood rinsed from a person's body to travel downward in the shower, rather than moving horizontally in a broad, uniform, 3-foot horizontal band. Hence, the Luminol reaction in the shower is probably attributable to Bilbia's cleaning materials, not to the presence of blood. There was no indication that any bloody clothing was placed anywhere in the vicinity of the shower.

II. DISCUSSION

Cooper advances several claims in his current habeas application. In my view, two of them are meritorious. I mean "meritorious" in a special sense. In part, I mean that they appear to be meritorious on the current record. In part, I also mean that if the district court had done its job-including performing the EDTA test on Cooper's blood on the tan t-shirt as we directed it to do-the likelihood of their being meritorious would be much higher.

First, Cooper claims that the State presented false evidence at trial, in violation of *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791

(1935), and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Second, Cooper claims that the State failed to reveal exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Under both claims, Cooper claims actual innocence under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). I discuss the two claims in the following sections.

A. PRESENTATION OF FALSE EVIDENCE

When we granted Cooper permission to file his second or successive habeas application in 2004, we specifically directed the district court to test Cooper's blood on the tan t-shirt "for the presence of the preservative EDTA." *Cooper*, 358 F.3d at 1124. The purpose of the test was to determine whether Cooper's blood had been planted on the t-shirt. Judge Silverman stated the importance of the test: "Cooper is either guilty as sin or he was framed by the police. There is no middle ground." *Id.* ***595** (Silverman, J., concurring in part and dissenting in part).

I begin my discussion of Cooper's claim that the State presented false evidence with discussion of the EDTA testing. I do not do so because such testing will reveal directly whether the State presented false evidence during trial. The State did not put the t-shirt into evidence at trial. Rather, Cooper introduced it into evidence because the State could not show that any of Cooper's blood was on it. Thus, even if state actors did plant Cooper's blood on the t-shirt, the State did not thereby present false

evidence at Cooper's trial. If state actors did plant Cooper's blood on the t-shirt, they likely did so long after trial-after DNA technology became available and after Cooper requested that DNA testing be performed on the t-shirt.

Nonetheless, for two reasons, I begin with a discussion of the EDTA testing. First, if state actors planted Cooper's blood on the t-shirt, this raises a very powerful inference that numerous pieces of evidence presented at trial were also planted by state actors. Second, if state actors planted this evidence, its presentation at trial violated Cooper's due process rights under *Mooney* and *Napue* and is the basis for a claim of innocence under either *Schlup* or 28 U.S.C. § 2244(b)(2)(B).

1. TESTING FOR EDTA

The district court was hostile to our direction to perform EDTA testing on the t-shirt. In its order, the district court wrote, "Based on the last-minute representations made by Petitioner regarding scientific testing capabilities, the en banc panel of the Ninth Circuit concluded [that the district court should order EDTA testing]." Dist. Ct., 510 F.3d at 932. In discussing the EDTA tests during a hearing, the district court stated orally, "But the en banc panel didn't get it." 6/3/04 RT 74. Whether as a result of its hostility to the EDTA testing or for some other reason, the district court failed to comply with our direction to perform the testing.

a. *Daubert*

As a threshold matter, the district court concluded, incorrectly, that EDTA testing failed the test of admissibility under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The court wrote that "the ubiquity of EDTA in the environment prevents any meaningful interpretation of the significance of an 'elevated' level of EDTA within a forensic sample." Dist. Ct., 510 F.3d at 941 (emphasis added). The court found that EDTA testing was therefore not reliable. *Id.* at 943-46. The court's exclusion of EDTA evidence under *Daubert* was based on an error of law, and therefore constituted an abuse of discretion. See *United States v. Morales*, 108 F.3d 1031, 1035 & n. 1 (9th Cir.1997) (en banc).

The district court confused the reliability of EDTA testing, the first prong of the *Daubert* analysis, with the issue of what that testing can prove, the second prong of the *Daubert* analysis. See *Daubert v. Merrell Dow Pharms.*, Inc., 43 F.3d 1311, 1315 (9th Cir.1995) (describing the two prongs of the *Daubert* analysis). It was uncontested at the 2004-2005 hearing in the district court that laboratory testing can reliably determine the amount of EDTA in any given sample. The district court found that "the levels of EDTA in the T-shirt were accurately measured" by Cooper's expert, Dr. Ballard. Dist. Ct., 510 F.3d at 941. The first prong of *Daubert* was thus satisfied.

The only contested issue was the second prong-what the presence of EDTA proved or tended

to prove. The district court rejected Dr. Ballard's testimony because it erroneously concluded that his measurements,***596** even though accurate, did not satisfy the second prong of *Daubert*. See Dist. Ct., 510 F.3d at 941 ("Lacking any evidence to show that EDTA testing is a *reliable means of determining whether a blood sample has been planted*, the Court concludes that Petitioner's EDTA evidence fails the *Daubert* test." (emphasis added)).

It is hornbook law that evidence is admissible under *Daubert* if there is an accepted scientific method for making a reliable measurement, even if the evidentiary significance of the measurement can be disputed. See *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."). For example, courts (including the trial court in this case) regularly admit evidence of Luminol testing for the presence of blood, even though Luminol does not indicate the origins of the detected blood. In fact, Luminol does not even definitively prove the *presence* of blood. As noted above, other common substances, including bleach, also react with Luminol. 11/14/84 RT 3142, 3169-70. The district court in this case repeatedly referred to the results of Luminol testing as probative of Cooper's guilt. Dist. Ct., 510 F.3d at 907-08, 909, 910, 957. EDTA test results, like Luminol test results, satisfy the second prong of Daubert because they "logically advance [ ] a material aspect of [Cooper's] case." See *Daubert*, 43 F.3d at 1315.

The district court concluded that even if EDTA testing were admissible under *Daubert*, the results

of the tests in this case do not support Cooper's contention that his blood was planted on the t-shirt. Dist. Ct., 510 F.3d at 948. I disagree. In the following two sections, I discuss errors committed by the district court in conducting the EDTA tests and in refusing to continue that testing. I then discuss the information revealed by the testing so far conducted, and show that even the truncated EDTA testing strongly suggests that Cooper's blood was planted on the t-shirt.

b. Errors by the District Court

In conducting the EDTA tests, the district court made six fundamental errors.

First, the district court refused to allow any of Cooper's experts to assist in choosing the portions of the t-shirt to be tested. Indeed, the court refused to allow Cooper's experts even to *see* the t-shirt.

Second, the district court refused to allow any testing of the samples chosen in order to determine whether the stains on the samples were actually blood stains.

Third, the district court refused to permit discovery into why blood from vial VV-2-the blood taken from Cooper two days after his arrest-contained the DNA of two different people. One obvious explanation is that someone removed some of Cooper's blood from the vial and then added someone else's blood to conceal the fact that he or she had removed Cooper's blood.

Fourth, when the state-designated laboratory came back with a result of an extremely high level of EDTA in the sample supposed to contain Cooper's blood, thereby indicating that the blood had been planted, the lab director withdrew his results because of unspecified "contamination" in his lab. The district court refused to permit Cooper's attorneys to see the lab's raw data or notes, thereby preventing an inquiry into whether, in fact, there had been contamination, and into the significance of such contamination.

Fifth, the district court erroneously concluded that several samples from the t-shirt were proper "controls" when, in fact, they were not. These samples contained both human DNA and EDTA, which indicated*597 that they likely contained blood that had been planted on the t-shirt. Because the district court erroneously concluded that these samples were proper controls, it erroneously disregarded the test results obtained by the two laboratories.

Sixth, when the district court concluded that the results of the EDTA testing were inconclusive, it refused to permit more testing, even though such testing was feasible.

I discuss each of these errors in turn.

i. Refusal to Allow Cooper's Experts to Assist in Choosing Portions of the T-shirt to Be Tested

One of Cooper's experts, Dr. Peter DeForest, repeatedly sought to participate in the process of

examining the tan t-shirt and determining which parts of the t-shirt might be suitable for sampling. On August 4, 2004, Dr. DeForest filed a declaration noting that "new cuttings" of the t-shirt would be needed to perform the testing. He wrote, "[I]t is essential that the T-shirt be inspected in person to select the areas to be sampled by cutting as well as those to serve as suitable control areas." ER 4021. On September 4, he wrote a letter to the district court, stating that he was concerned about the testing protocol that had been developed. He wrote:

> This protocol was generated without significant input from me. I feel this protocol is flawed. I will not agree [to] do any sampling according to this protocol. It will not be possible to obtain any meaningful quantitative results using it....
>
> ... Once I have examined the shirt, I am willing to design an approach for review by another scientist or develop one in conjunction with a criminalist representing the prosecution. As I have been trying to explain for some time now, there needs to be a careful assessment of the shirt followed by a scientific consensus on the pre-extraction sampling....
>
> The samples need to be taken in such a way that it is possible to relate any quantitative findings[of EDTA levels] to a specific amount of bloodstain. This is not possible with the protocol specified in the order. In addition, there is the possibility that a scientific

> consensus might be that sampling that would allow a meaningful result is simply not possible. In such a case, samples should not be taken.

ER 4128-29.

The response of the district court was to exclude Dr. DeForest. On September 7, three days after the date of Dr. DeForest's letter, the district court ordered that the t-shirt be sent to Dr. Lewis Maddox of the Orchid Cellmark laboratory. Dr. Maddox's laboratory is not associated with either Cooper or the State. The court directed Dr. Maddox and Gary Sims (or Sims' designee) to prepare "Area 6G" of the t-shirt for testing, and to select other portions of the t-shirt for use as controls. ER 4151. Mr. Sims is Director of the California Department of Justice Laboratory. The court's order did not allow a representative of Cooper to be present during the selection process.

Dr. DeForest was prescient. Area 6G of the t-shirt (the area specified in the court's order) was the area that had been originally tested for DNA. That earlier testing had confirmed Cooper's blood was present in Area 6G. Upon close inspection by Dr. Maddox, Area 6G turned out to be unsuitable for further testing because there was no blood remaining in that area. The State notified the district court of this fact on September 13.

That same day, Cooper's lawyer wrote to the district court, "[M]ost importantly, *598 Petitioner

vigorously requests that an expert of his be allowed to inspect the T-shirt and be part of the selection and preparation process for the anti-coagulant [EDTA] testing." ER 4205. At 5:30 p.m. that same day, the district court denied Cooper's request to have a representative present during the selection and preparation process. The court wrote, "The court denies petitioner's request to have his own observer present at the preparation of the T-shirt for the EDTA testing. The court acknowledges that the 6-G stain is not suitable for testing. The court orders Dr. Maddox, in consultation with Dr. Myers [Mr. Sims' designee, the State's representative], to select an appropriate stain area and prepare it for EDTA testing[.]" ER 4207.

As a matter of due process, a court is required to allow both sides to participate when important decisions are made. Where, as here, serious objections were made to the manner of choosing and processing samples to be tested, the district court failed in its duty to provide a fundamentally fair process.

ii. Refusal to Allow Testing of the Newly Chosen Sample for the Presence of Blood

Dr. Maddox and Mr. Sims' designee, Mr. Myers (the district court erroneously referred to him as Dr. Myers), chose an area of the t-shirt between stains labeled 6J and 6K as a replacement for Area 6G. In their view, this area was likely to contain Cooper's blood. They therefore took their sample from this area. They then divided the sample into three pieces. They sent one of the pieces to the

state-designated lab, sent one to Cooper's designated lab, and retained the third piece at Dr. Maddox's lab. However, no one tested the new sample (or any part of it) to determine if any of the three pieces actually contained blood.

Cooper objected to the failure to test the newly chosen sample for blood. He specifically requested that it be tested to determine if it contained blood. The district court denied the request on the ground that Cooper had not previously requested testing of the sample for the presence of blood. See 4/22/05 RT 10-11, 57-58, 171-72; see also Dist. Ct., 510 F.3d at 935 n. 16. The district court's refusal to test the newly chosen sample for the presence of blood was wrong on two counts.

First, the district court was wrong procedurally. It was unfair to fault Cooper for not having previously requested testing of the sample for blood. Up until September 13, Cooper reasonably assumed that the sample to be chosen for testing would come from the stain in Area 6G, which everyone believed contained Cooper's blood. It was therefore unnecessary to request testing of a sample from Area 6G for the presence of blood. Such testing only became necessary when a new sample was chosen. After Area 6G was deemed unsuitable, even the *State* told the district court that additional testing of the new subject sample "would be required to determine whether Cooper's blood is actually present in the stain." ER 4194. Cooper had no reason specifically to request this additional testing after the State said that it was "required."

Second, and more important, the district court was wrong substantively. Because of the failure to test the new sample for the presence of blood, it was possible that, as intended by the protocol, all of the pieces of the new sample sent for EDTA testing had Cooper's blood. But it was also possible that one or more of the pieces had none of his blood. This second possibility was greatly enhanced for the new sample, as compared to the old one from ***599** Area 6G. The new sample was adjacent to Area 6G, and therefore Dr. Maddox and Mr. Myers assumed that it contained Cooper's blood. But it was unclear how far into the new sample Cooper's blood extended (if indeed his blood extended into the new sample at all). Further, the new sample was both larger and more irregularly shaped than the old sample, making it even more likely that any blood on the sample was not evenly distributed throughout the entire sample.

As I discuss below, these characteristics of the new sample may well account for the radical difference obtained by the two labs in testing their pieces of the sample. The State-designated lab found an extremely high level of EDTA in its piece. The Cooper-designated lab found an elevated but lower level of EDTA in its piece. This disparity could well have happened because the state-designated lab tested a piece that contained Cooper's blood, and the Cooper-designated lab tested a piece that did not contain his blood, or contained considerably less of it. If the district court had permitted testing of the new sample for blood-and, specifically, Cooper's blood-we would know the answer.

iii. Refusal to Permit Inquiry into Why Vial VV-2, Which Should Have Contained Only Cooper's Blood, Contained the DNA of Two or More People

On August 1, 1983, two days after Cooper's arrest, two SBCSD criminalists drew Cooper's blood. They put that blood into a vial labeled VV-2. The vial contained the preservative EDTA. In 2004, during the court-ordered testing of the hairs Jessica clutched in her hand,[3] the State made a mistake. It inadvertently sent a card containing blood from vial VV-2 to Dr. Terry Melton, the expert charged with testing the hairs. ER 3187. This was the first time since 1983 that any non-State personnel had been permitted to see or test blood from vial VV-2.

Dr. Melton tested the blood from VV-2, unaware of the fact that the State had not intended to send it to her. Dr. Melton found that the blood from VV-2 contained the DNA of two or more people. This was a truly startling finding. On August 2, 2004, Dr. Melton informed the court of her finding. ER 5645.

Vial VV-2 originally contained only Cooper's blood, and should have continued to contain only Cooper's blood. The most logical explanation for the finding is that someone added another person's blood to the vial. Why might that have been done? One

---

[3] I do not pursue the argument here, but there is ample reason to conclude that the district court also disregarded our directive by unduly limiting the mitochondrial DNA testing of the hairs in Jessica Ryen's hand and by prematurely foreclosing the opportunity for further testing.

explanation is that someone took some of Cooper's blood out of the vial for some purpose (planting it on the t-shirt?), and wanted the vial to appear as full as it previously had been. In order to accomplish that, he or she had to add someone else's blood to the vial to bring it back up to the proper level.

On August 4, Cooper's lawyer raised Dr. Melton's discovery with the district court. Perhaps the court thought Cooper's lawyer was speaking of DNA from the hairs. The court stated, "[W]e never expected that it was going to be Cooper." 8/6/04 RT 138. Counsel replied, "[I]t is not the hairs that were sent that we're talking about. It is the known sample that was sent, and that's been contaminated. And there is a very serious issue about that." *Id.* at 139.

***600** On September 10, Cooper moved for an evidentiary hearing, inter alia, "to determine the cause for the appearance of a 'mixture' of DNA in Petitioner's blood sample also submitted to Dr. Melton." He wrote:

> VV-2 is the blood sample collected from Petitioner at the time of his arrest [.] ... [The][b]lood sample should only have contained Petitioner's DNA [.] ... Dr. Melton's report reveals that a mixture of DNA sources was detected in VV-2.... In light of prior evidence presented by Petitioner regarding tampering or contamination of biological evidence in this case, Dr. Melton's findings regarding VV-2 are extremely alarming and mandate further inquiry.

ER 4168. On February 3, 2005, the district court denied Cooper's motion. It did not mention vial VV-2 in its order.

On April 22, 2005, in final oral argument to the district court, Cooper's counsel returned to the subject of the blood in vial VV-2. He said, "[W]ith regard to VV-2, I just want to be-make this clear. There seems to be a possible misunderstanding. VV-2, which is the sample that Doctor Melton tested and found a mixture in, it's Petitioner's blood sample. It is not a hair sample. I wasn't sure if the Court was clear on that." 4/22/05 RT 153. The court immediately interrupted, "And it's consumed." *Id.* Cooper's counsel agreed that Dr. Melton had consumed the sample on the card she had been sent, but stated, "[T]hat doesn't necessarily mean that there isn't more VV-2 in San Bernardino or at the DOJ that could be tested." *Id.* The State's counsel then responded, "I can represent to the Court that VV-2 was completely consumed by Doctor Melton. Doctor Melton was shipped the remainder of this particular blood sample, and she consumed it, and it's reflected in her report. So we don't have any more of that particular reference sample." *Id.* at 156.

The State's counsel seems to have meant to say (or at least to have meant the court to understand) that there was no blood remaining in vial VV-2. If that is what counsel meant to say, it was a startling statement. The State had never before said or even suggested such a thing. For example, when Cooper moved in September 2004 for an evidentiary hearing on how the DNA of two people came to be in vial

VV-2, the State did not say or even suggest that vial VV-2 was empty. Nor had the State ever presented evidence to support such a statement. Nor had the district court relied on the fact that vial VV-2 was empty in denying Cooper's motion for an evidentiary hearing.

Cooper's counsel told the district court that Dr. Melton's finding that the DNA of two or more people was in the blood that came from vial VV-2 was "extremely alarming and mandate[d] further inquiry." The district court refused to allow any investigation into the issue, even though the presence of additional DNA in vial VV-2 clearly pointed to evidence tampering by the State.

iv. Refusal to Allow Access to the State-Designated Lab's Raw Data and Notes Concerning Asserted Contamination

Dr. Maddox of the Orchid Cellmark laboratory sent a total of ten samples to each of the two designated testing labs. Dr. Siuzdak was the tester designated by the State. Dr. Ballard was the tester designated by Cooper.

Sample 1 was a piece of the t-shirt that had been chosen by Dr. Maddox and Mr. Myers as likely to contain Cooper's blood. Samples 2-6 were taken from other parts of the t-shirt and were intended to serve as controls. Samples 7-10 were not taken ***601** from the t-shirt; they were also intended to serve as controls.

As I will explain below, the EDTA results obtained by Dr. Siuzdak and Dr. Ballard are remarkably consistent for all of the samples except Sample 1 and Sample 8. Dr. Siuzdak found that his piece of Sample 1 (the sample supposedly containing Cooper's blood) contained an extremely high level of EDTA, more than twice as high as any other sample. If Dr. Siuzdak's piece of Sample 1 contained Cooper's blood, and if his EDTA result is valid, this indicates that Cooper's blood was planted on the t-shirt. By contrast, Dr. Ballard found that his piece of Sample 1 contained a somewhat elevated, but fairly low, level of EDTA.

Dr. Siuzdak submitted his report, containing the high EDTA reading for Sample 1, to the district court on October 5, 2004. On October 27, without prior warning, Dr. Siuzdak withdrew his report. His fax to the court stated in its entirety:

> On Monday, October 5th I submitted a report on the Cooper samples tested for the presence of EDTA. I now believe that the samples tested were contaminated with EDTA in my laboratory and therefore must retract the report submitted. I deeply apologize for the inconvenience and confusion this report may have caused.

ER 4464.

Cooper moved to be allowed access to Dr. Siuzdak's raw data and bench notes relevant to his testing of all the samples. ER 4465-82. The district court denied this access. ER 4751. Cooper

has never been permitted to see Dr. Siuzdak's raw data and bench notes, and has never been permitted to investigate the nature and possible significance of the purported contamination. Dr. Siuzdak has never been asked to provide an explanation for his conclusion that there was contamination in his lab.

v. District Court Reliance on Faulty Controls

As discussed in greater detail below, five supposed "control" samples were taken from the tan t-shirt. When the two laboratories tested these samples, everyone assumed that they contained no human material (and therefore no human DNA) and that they contained only a background level of EDTA. However, at least three of the five purported control samples taken from the t-shirt (Samples 2, 3, and 4) actually contained human DNA. ER 4659, 4669. The amount of DNA in these samples corresponds closely with an elevated level of EDTA in these same samples. The combined presence of DNA and elevated levels of EDTA strongly suggest that these samples contained preserved blood that had been planted on the t-shirt. Therefore, these "control" samples from the t-shirt were not, in fact, controls at all. Nonetheless, the district court assumed that these samples were valid controls.

Because the district court assumed that Samples 2, 3 and 4 were valid controls, it concluded that the results of the DNA tests were invalid. *See* Dist. Ct., 510 F.3d at 939 ("The EDTA level in the subject stain is not elevated, but is instead *lower than that of most of the control areas.* As a result, the test refutes Petitioner's tampering theory." (emphasis

added)); *id.* at 941 ("From the test data, the Court concludes that the level of EDTA in the subject stain is 110 nanograms. *Comparing* the EDTA level of the subject stain *to that for the control specimens*, the Court concludes that there is no reliable evidence of tampering." (emphasis added)). But because the district court erred in assuming that these samples were valid controls, it ***602** erred in concluding that the results of the DNA tests were invalid.

The only sample that could provide a baseline level of EDTA in the t-shirt, and could thus serve as a valid control, is Sample 6. It is the only sample from the t-shirt that contained no human DNA. Both Dr. Ballard and Dr. Siuzdak found only background levels of EDTA in Sample 6. The levels of EDTA found in Sample 6 by both Dr. Ballard and Dr. Siuzdak were far lower than the levels of EDTA found in any other sample taken from the t-shirt. (Recall that the district court found that "the levels of EDTA in the T-shirt were accurately measured" by Dr. Ballard. Dist. Ct., 510 F.3d at 941.) The virtual absence of EDTA in Sample 6 when compared with the elevated EDTA levels in Sample 1, particularly the portion of Sample 1 tested by Dr. Siuzdak, strongly suggests that Cooper's blood was planted on the shirt.

vi. Refusal to Allow Further Testing

The district court refused to allow further EDTA testing after Dr. Ballard and Dr. Siuzdak made their reports, and after Dr. Siuzdak withdrew his report on the ground of asserted contamination. If the piece of Sample 1 tested by Dr. Siuzdak contained

Cooper's blood, as Dr. Maddox and Mr. Myers thought it did, and if Dr. Siuzdak's finding of an extremely high level of EDTA in his piece of Sample 1 is valid, there is no question that Cooper's blood was planted on the t-shirt.

The district court refused to allow further testing despite the fact that Dr. Siuzdak and Dr. Ballard still have sufficient amounts of the samples provided to them to perform further testing. In light of the high level of EDTA detected by Dr. Siuzdak on his piece of Sample 1, and in light of the unexplored nature of Dr. Siuzdak's belief that there was contamination in his laboratory, it was unreasonable not to pursue further testing.

c. What the EDTA Test Results Tell Us When Combined with DNA Tests on the Same Samples

After Dr. Ballard and Dr. Siuzdak submitted their reports to the district court, the Orchid Cellmark laboratory sent other pieces of the samples to the State of California's DNA laboratory to determine how much DNA was on those samples. ER 4659, 4669. When Dr. Ballard and Dr. Siuzdak submitted their reports, they did not know the results of this DNA testing.

The results of the EDTA testing (performed by Drs. Ballard and Siuzdak) and the DNA testing (performed by the State lab) can be put into a single table. In reading this table, recall that Sample 1 is the sample thought to contain Cooper's blood.

Table 1: EDTA and DNA Data (nanograms)[4]

Sample	Siuzdak EDTA[5]	Ballard EDTA	DNA
1	3341	110	.55
2	856	220	.33
3	1545	360	.77
4	773	160	.21
5	438	110	inconclusive
6	271	16	0
7	480	7	N/A
8	1608	1100	N/A
9	376	6	N/A
10	313	0	0

***603** We can draw two conclusions from the table.

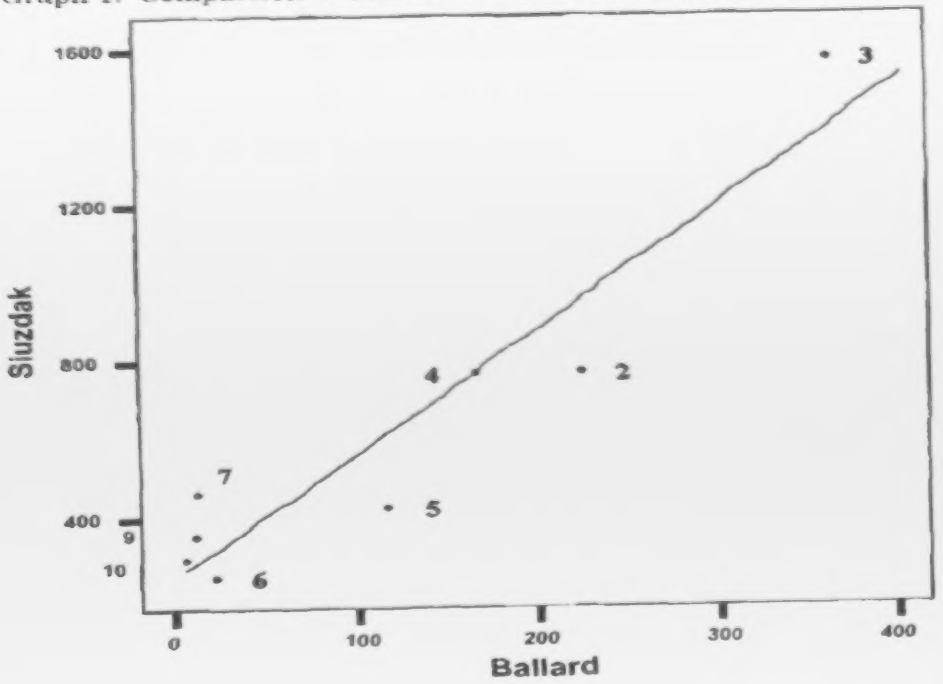
First, we can conclude that Dr. Siuzdak's EDTA results are very likely valid based on a comparison of his results with those of Dr. Ballard. A comparison of the results for Samples 2-7 and 9-10 (that is, excluding Samples 1 and 8) shows that the results obtained by Dr. Siuzdak and Dr. Ballard are consistent. Dr. Siuzdak's results are expressed in higher absolute numbers than Dr. Ballard's, but the relative numbers of the two are remarkably consistent. This may be seen in the following graph:

---

[4] The data are from Lee Report (Siuzdak EDTA); ER 5414 (Ballard EDTA); ER 4659, 4669(DNA). The district court did not order DNA testing of control Samples 7 through 9.

[5] Dr. Siuzdak reported his values as concentration of EDTA. Dr. Lee's analysis of the EDTA results converted Dr. Siuzdak's "values to the equivalent amount of EDTA in the original cloth cuttings." Lee Report at 2.

Graph 1: Comparison of Ballard and Siuzdak EDTA Measurements[6] (Excluding Samples 1 and 8)



[6] The best fit linear regression equation for these data is: Siuzdak = 288.078 + 3.031 * Ballard. The R 2 value for these data is 0.892; the regression coefficient for the independent variable is statistically significant at $p < 0.001$.

The consistency in results for Dr. Siuzdak and Dr. Ballard strongly suggests that Dr. Siuzdak's results are valid. That is, if Dr. Siuzdak had EDTA contamination in his lab or if his instruments were miscalibrated, the contamination or miscalibration affected all of his measurements equally. If this is true, Dr. Siuzdak's results-as measurements of relative rather than absolute amounts of EDTA-are valid.

For purposes of this comparison (and of the above graph), I excluded Samples 1 and 8. Sample 8 is a control not taken from the t-shirt. It is a piece of cloth onto which Dr. Maddox at Orchid Cellmark had placed a known amount of EDTA-preserved blood, with a known concentration of EDTA. Both Dr. Siuzdak and Dr. Ballard found greatly elevated levels of EDTA in Sample 8, though Dr. Siuzdak found a relatively higher EDTA level. That difference*604 may be partially explained by Dr. Siuzdak's relatively higher amounts of EDTA for all of his samples. The remaining disparity may not be significant. Dr. Terry Lee, an expert hired by the State to evaluate the results of Dr. Siuzdak and Dr. Ballard, concluded that the disparity in results for Sample 8, considered by itself, was not significant. Respondent's Analysis of EDTA Test Results, Oct. 28, 2004, Docket No. 264, Ex. A at 2.

That leaves Sample 1. Sample 1 is the new sample thought to contain Cooper's blood. It was chosen by Dr. Maddox and Mr. Myers to replace the old sample from Area 6G. Though Sample 1 supposedly contained Cooper's blood, we cannot be sure that it did, as I explained above. Dr. Siuzdak

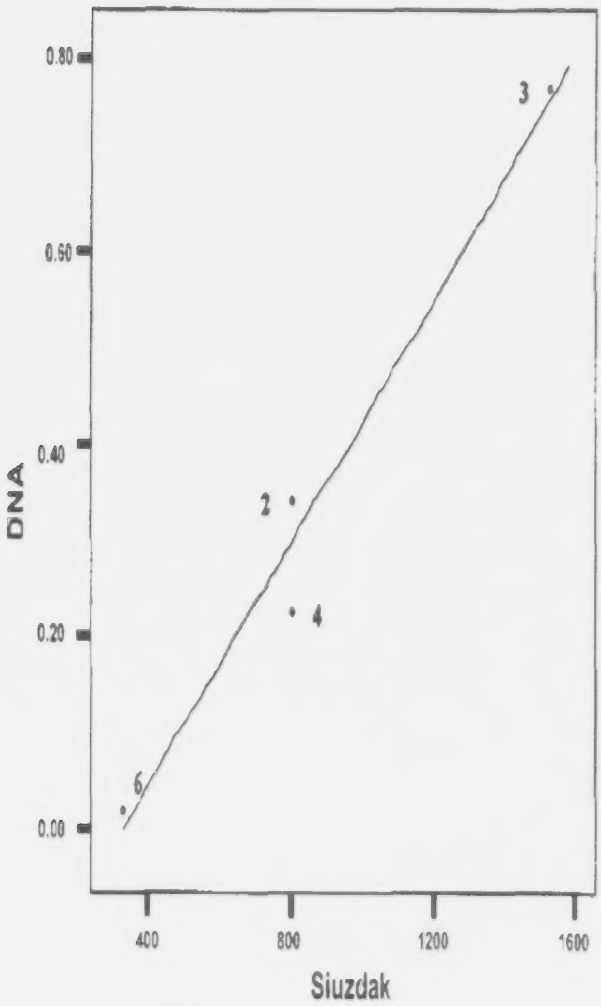
measured an extremely high level of EDTA for Sample 1. Dr. Ballard measured only a somewhat elevated level of EDTA for Sample 1. A possible, perhaps likely, reason for the disparity in their results is that Dr. Siuzdak's piece of Sample 1 contained a great deal of Cooper's blood, while Dr. Ballard's piece contained significantly less, perhaps none. Sample 1 was an unusually large sample by comparison to the other samples. It was also irregularly shaped, unlike the other samples which were simple squares. ER 5202-03. Finally, Dr. Maddox and Mr. Myers assumed that all of Sample 1 contained Cooper's blood. But, as noted above, they did not perform any tests on Sample 1, or its individual pieces, to confirm this assumption.

Second, we can conclude that Dr. Siuzdak's EDTA results are very likely valid, based on analysis of Samples 2, 3 and 4. Samples 2, 3 and 4 were supposed to be control samples that contained no blood. Instead, they almost certainly contain significant amounts of blood. Further, it is likely that this blood was planted on the t-shirt. This may be seen if we look at both the DNA and the EDTA results for Samples 2, 3, 4 and 6. All four of these samples were taken from the t-shirt, and were supposed to have been control samples. (Sample 5 has inconclusive DNA results, so I put it to one side. Samples 7, 8, 9 and 10 are control samples that were not from the t-shirt, so I put them to one side also.)

For Samples 2, 3, 4 and 6, we have a known amount of DNA and a known amount of EDTA. Samples 2, 3 and 4 all have significant amounts of DNA. Only Sample 6 has no DNA. For all four of

these samples, there is a remarkably strong correlation between the amount of DNA in the sample and the amount of EDTA in the sample. The greater the amount of DNA in a sample, the greater the amount of EDTA in that sample. This holds true for the results of both Dr. Siuzdak and Dr. Ballard. This may be seen in two graphs, one for Dr. Siuzdak's results and one for Dr. Ballard's results:

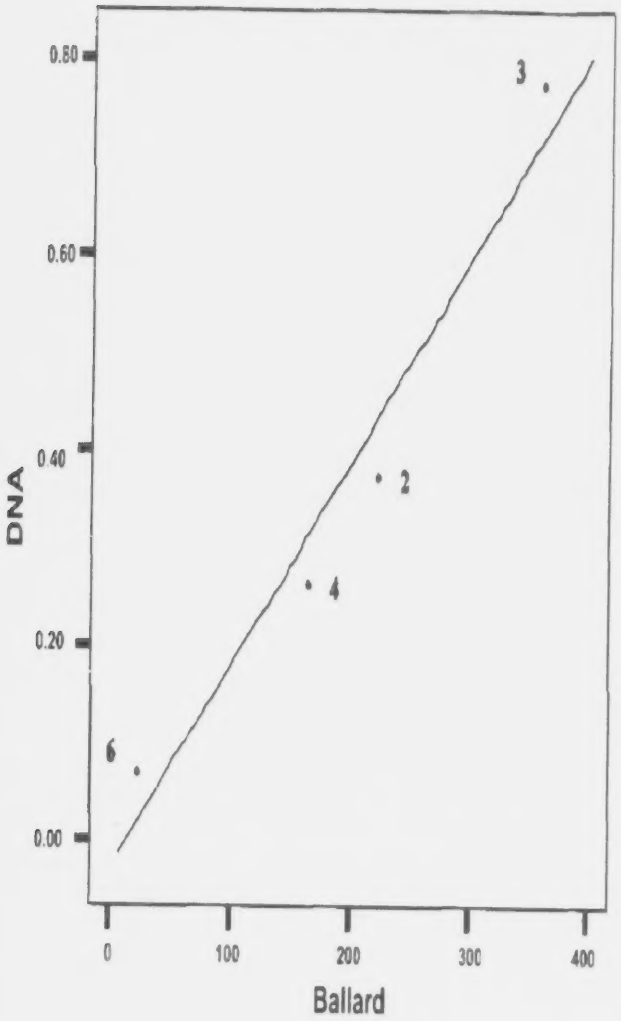
Graph 2: Correlation Between DNA and Siuzdak's EDTA Measures[7] (Samples 2, 3, 4, and 6)



[7] The best fit linear regression equation for these data is: DNA = -0.185 + 0.001 * Siuzdak. The R^2 value for these data is 0.974; the regression coefficient for the independent variable is statistically significant at $p = 0.013$.

BEST AVAILABLE COPY

Graph 3: Correlation Between DNA and Ballard's EDTA Measures[8] (Samples 2, 3, 4, and 6)



[8] The best fit linear regression equation for these data is: DNA = -0.093 + 0.002 * Ballard. The R^2 value for these data is 0.955; the regression coefficient for the independent variable is statistically significant at $p = 0.023$.

These graphs, showing the presence and amount of DNA in Samples 2, 3, 4, and 6, tell us a number of things. First, they tell us that Samples 2, 3 and 4 are not valid controls. Thus, the district court erred in treating them as controls when it interpreted (and disregarded) Dr. Ballard's results. See, e.g., Dist. Ct., 510 F.3d at 939. The EDTA levels in Sample 6, the only true control, are significantly lower than the EDTA levels in Samples 2, 3 and 4, and in Sample 1, the sample thought to contain Cooper's blood.

Second, the variation in EDTA levels in three supposed control samples-Samples 2, 3 and 4-directly corresponds with the variation in human DNA levels in those samples. EDTA is present in many substances, such as laundry detergent, salad dressing, and household cleaners. *See* Dist. Ct., 510 F.3d at 947 & n. 34. Those substances, however, do not contain human DNA. Human blood stored in purple-topped EDTA tubes, such as those used by the SBCSD, has *both* EDTA and human DNA. Samples 2, 3 and 4 had elevated levels of EDTA and correspondingly elevated levels of human DNA. The most plausible explanation is that the EDTA was deposited on the t-shirt along with human DNA. The most logical source of such a deposit is human blood stored in a purple-topped EDTA tube.

We know that Cooper's EDTA-preserved blood sample (VV-2) and other EDTA-preserved blood samples from the victims were kept in an evidence refrigerator to which up to twenty people had ready access. 6/23/03 RT 106, 134. We also know that blood could be withdrawn from those tubes without

breaking any seals. 6/25/03 RT 330. Finally, we know that "anyone with access to that refrigerator ... could take items in and out of it without there being any record of it at all, without any written record." 6/23/03 RT 134. This information, coupled with the ***607** EDTA and DNA findings described above, strongly suggest that someone in the SBCSD took blood from one or more purple-topped EDTA tubes and placed that blood on the t-shirt.

Third, the district court did not account for the correlation between human DNA and EDTA in the control samples when it stated: "While the extraction and measurement of EDTA in a sample may theoretically be accomplished, the ubiquity of EDTA in the environment prevents any meaningful interpretation of the significance of an 'elevated' level of EDTA within a forensic sample." Dist. Ct., 510 F.3d at 941. The data demonstrate that, contrary to the view of the district court, meaningful interpretation of the significance of an elevated level of EDTA *is* possible. They demonstrate, in fact, that Dr. Siuzdak's test results were probably valid.

d. What Dr. Siuzdak Did Not Know

Neither Dr. Siuzdak nor Dr. Ballard, nor indeed any expert, was given the opportunity by the district court to look at both the EDTA and the DNA data.

When Dr. Siuzdak withdrew his results, he was unaware of Dr. Ballard's results. He was also unaware of the results of the DNA testing by the State. We are now able to see what Dr. Siuzdak could not see when he withdrew his test results.

First, Dr. Siuzdak was unaware of the remarkable congruence of his supposedly contaminated results with those of Dr. Ballard. Second, Dr. Siuzdak was unaware that Samples 2, 3 and 4 each contained significant amounts of DNA, which closely correlated with the amount of EDTA in those samples. Dr. Siuzdak mistakenly thought those samples contained no blood, and therefore should have contained no EDTA. He thus thought that Samples 2, 3 and 4 were valid controls, and that he should have found little or no EDTA in them. Had Dr. Siuzdak known that Dr. Ballard had obtained remarkably congruent results, and that Samples 2, 3 and 4 contained human DNA and were not valid controls, it is entirely possible, perhaps likely, that he would not have withdrawn his results based on supposed contamination in his lab. It should have been an easy matter to ask Dr. Siuzdak whether, in light of what the district court later learned, he would still withdraw his test results. The district court, however, did not do so.

e. Summary

It is clear from the foregoing that the district court did not properly carry out our directive to perform EDTA testing on Cooper's blood on the t-shirt. The court did not permit Cooper's experts to participate in or even see the selection of the t-shirt samples chosen for testing. It refused to allow testing of the newly chosen sample, which was supposed to contain only Cooper's blood, to determine if, in fact, it contained his blood, or any blood at all. It refused to permit an inquiry into why vial VV-2, which was supposed to contain Cooper's

blood, contained the DNA of two or more people. It refused to permit discovery of Dr. Siuzdak's raw data and bench notes after he withdrew his test results-results that strongly suggested that Cooper's blood had been planted. It incorrectly concluded that Samples 2, 3 and 4 were proper controls, and therefore incorrectly concluded that the testing laboratories' results could not be correct. And it refused to allow further testing after it allowed Dr. Siuzdak to withdraw test results that had been favorable to Cooper.

The test results that we do have strongly suggest that Dr. Siuzdak may not have had contamination in his laboratory that invalidated his results, and strongly suggest that Dr. Siuzdak's sample, supposedly ***608** containing Cooper's blood, did in fact contain an extremely high level of EDTA. In other words, the test results we already have strongly suggest that Cooper's blood was planted on the t-shirt.

2. FALSE EVIDENCE PRESENTED AT TRIAL

If the EDTA testing already performed shows that Cooper's blood was planted on the t-shirt, or if further EDTA testing does the same thing, that showing greatly increases the likelihood that much of the evidence introduced at trial was false. If the State introduced false evidence at trial, it violated Cooper's constitutional right to due process under *Mooney* and *Napue*. If Cooper's constitutional right to due process was violated, he has satisfied the threshold test for showing actual innocence under *Schlup*. In assessing whether a federal habeas

petitioner has made a showing of actual innocence under *Schlup*, a district court is not limited to evidence introduced at trial. Rather, it may consider all relevant evidence. See *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir.1997) (en banc).

a. The False Evidence

If Cooper's blood was planted, that would greatly increase the likelihood that the following evidence at trial was false.

i. Josh Ryen's Testimony

Josh Ryen was eight years old at the time of the murders. He was left for dead in his parents' bedroom with his throat cut. He did not take the stand, but his audio-and videotaped testimony was introduced at trial. That testimony was that he saw either a single man or a single shadow in the house during the murders. This testimony was flatly inconsistent with the information he provided immediately after the murders.

(a). Josh Ryen's Testimony at Trial

Josh Ryen did not testify in person at trial. Instead, two recorded interviews with Josh were played for the jury. One was an audiotaped interview conducted in the office of a psychiatrist, Dr. Lorna Forbes, on December 1, 1983, six months after the murders. The other was a videotaped interview conducted on December 9, 1984, in the midst of Cooper's trial.

A transcript of the audiotaped interview with Dr. Forbes includes the following statements:

> Q [Dr. Forbes]: Who went to bed first? You guys or everybody all together or what?
>
> A [Josh]: I think my Mom, I, my sister and Chris went to bed, but my Dad stayed up.
>
> Q: You don't remember, for sure?
>
> A: That's what I think. Then I heard my Mom scream, and I walked in there with Chris, and I saw someone.
>
> Q: Well, did, did you mean? Where did you see him?
>
> A: Like over by the bed, my Mom's bed.
>
> * * *
>
> Q: Okay, was the person standing up or what?
>
> * * *
>
> A: And then I went back, and ...
>
> Q: Well, why did you go back; what was happening with the person standing by the bed; was he standing facing you, or what did you see?
>
> A: He was turning his back against me.
>
> * * *

> Q: Do you remember seeing him doing anything to your mother when she was screaming?
>
> A: No, I just saw his back and his hair.
>
> ***609** Q: And his hair? Was he bending over or standing up straight or what?
>
> A: Uh, he was like ... His head was down, he was down.

Final Stipulation Regarding Correction of Transcripts on Appeal, July 31, 1986, Interview of Josh Ryen by Lorna Forbes, Ex. D at 14-16 (ellipses in original; asterisks indicate omitted material). Later in the interview, Dr. Forbes asked Josh, "you went in there and saw this thing; did you think it was a man or a woman?" Josh replied, "I didn't ... probably a man because women usually don't do that sort of thing." *Id.* at 19.

We know that in this audiotaped interview Josh had described seeing a "puff of hair" on the killer. We also know that the State excised the "puff of hair" reference from the interview, and that this part of the interview was not played to the jury. 12/13/84 RT 4991-92. (I discuss below the significance of the "puff of hair" reference, and the significance of the prosecution not playing it for the jury.)

During the videotaped second interview, conducted in December 1984, counsel for both sides questioned Josh. Josh's grandmother, Dr. Mary

Howell, was also present during the interview. The videotaped interview was played for the jury on December 13, 1984, immediately before the jury heard the audiotaped interview with Dr. Forbes. The prosecutor asked, "Did you ever see anybody in the house that didn't belong there?" The examination proceeded:

> Q [prosecutor]: And when you say it could have been someone like your mom, who are you talking about, or what did you see that-
>
> A [Josh]: I don't really-saw like a shadow or something.
>
> Q: Where did you see the shadow?
>
> A: Like the bathroom was here. I saw it right like the bathroom.
>
> Q: By the bathroom?
>
> A: Yeah.
>
> Q: When did you see the shadow?
>
> A: When I saw my sister.
>
> Q: And how many shadows did you see?
>
> A: *Just one.*

12/13/84 RT 4968-69 (emphasis added).

In closing argument, the last evidence the prosecutor discussed in rebuttal was Josh's recorded

interviews. He emphasized the consistency of Josh's story in the two interviews, and argued that consistency showed that Cooper was the perpetrator:

> We have from Josh the same basic story to different people at different times that have been both tape recorded and videotaped.
>
> ... During the entire time that Josh was with his grandmother, a time of protection and love, Josh told the same basic story, a story that you ladies and gentlemen got a chance to hear, the story that shows that there was just ... one attacker: Kevin Cooper with a hatchet in one hand and a knife in the other.

2/7/85 RT 7823-24. On the second day of deliberations, the jury requested to rehear the entire audiotaped interview with Dr. Forbes. 2/8/85 RT 7863-A. This was the first of only two read-backs requested by the jury.

The story told in the two recorded interviews is incompatible with Josh's statements made immediately after the murders.

***610 (b). Josh Ryen's Statements Immediately After the Murders**

When Josh first arrived at the emergency room on the afternoon of June 5, he was unable to speak because his throat had been cut. Josh's handwriting was illegible. A clinical social worker named Don Gamundoy devised an effective way for Josh to communicate basic information. Gamundoy wrote

out the letters of the alphabet, numerals 0 through 9, and the words "yes" and "no" on a piece of paper on a clipboard. Josh was able to point to the letters, numbers, and the two words in responding to Gamundoy's questions.

Josh accurately indicated his full name, his date of birth, and his telephone number. Then Gamundoy asked Josh how many people attacked him. Josh pointed to "3" and "4" on the sheet. Gamundoy asked whether the attackers were male. Josh pointed to "yes." Gamundoy asked whether they were black. Josh pointed to "no." Gamundoy asked whether the attackers looked like Gamundoy, who is Hawaiian but is frequently mistaken for Hispanic. Josh pointed to "no." Gamundoy asked if the attackers were white. Josh pointed to "yes." ER 1272-79. Medical personnel treating Josh in the emergency room described Josh as conscious, alert, and immediately responsive during the time Gamundoy was questioning him. 1/10/85 RT 6229-30; 1/17/85 RT 6626, 6630, 6636.

SBCSD Sergeant Arthur, who was in charge of the investigation, dispatched Deputy Sharp to the emergency room. 1/8/85 RT 5980-82. Deputy Sharp was the first member of law enforcement to question Josh. Deputy Sharp entered the emergency room as Gamundoy was ending his own questioning, at about 2:23 p.m. 1/8/85 RT 5933, 5966-67. Deputy Sharp testified at trial that he questioned Josh in the emergency room from about 2:30 to 2:45, and then resumed questioning again in the CAT scan room at about 3:45. Gamundoy did not accompany Deputy Sharp and Josh into the CAT scan room. 1/8/85 RT

6007-08, 6018-19. Periodically during the interview, Deputy Sharp communicated with Sergeant Arthur who was at the scene of the crime.

Deputy Sharp's report and trial testimony suggest that even at this early stage of the investigation, the SBCSD did not want to be tied down to Josh's recollection of events. Deputy Sharp testified at trial that he dictated his report at 6 p.m. on June 5, but that he never verified that the typed version corresponded to his two or three pages of handwritten notes. He subsequently destroyed those notes. Deputy Sharp testified that he reviewed the typed report two days later, after having been out in the field and working on the case, and after interviewing people about the Lease house. Over the lunch recess during his trial testimony, Deputy Sharp altered the date on the report from June 6 to June 7, to make the date on his report correspond to the date he gave in his trial testimony. ER 1403; 1/8/85 RT 5991, 5994, 5998-6001.

Deputy Sharp testified at trial that he used a hand-squeeze method of communication with Josh. The hand-squeeze method, as described by Deputy Sharp, failed to provide Josh with an effective means of distinguishing between "no" and "I don't know." Deputy Sharp testified that a squeeze meant "yes." The absence of a squeeze meant "no." ER 1291-93. Deputy Sharp's report states that Josh "wr[o]te his name and point[ed] to numbers for his home phone number, date of birth, etc. Then, all other information was done by the suspect [sic] squeezing my hand in order to answer yes to any questions that I might ask." ER 1403-04. At trial, Deputy*611

Sharp could not explain how he had used the hand-squeeze method to elicit the first piece of information in his report that he attributed to Josh: "The victim first advised me that there were three white male adult subjects in the residence and he had been asleep." ER 1403, 1293-99. In all likelihood, Gamundoy was the source of this information. But according to Deputy Sharp's report, he obtained all of this information himself.

At trial, the prosecutor dismissed the information Josh provided to Gamundoy-that the murderers were three or four white men-as a mistake. The prosecutor contended that Josh had been confused, and that he had described the killers as three Mexican men who had come to the Ryen house during the day of June 4. Deputy Sharp's report indicates that he received information about the Mexicans in the CAT scan room, where, according to Deputy Sharp, Josh "seemed to be more alert." See also ER 1299. This part of the interview took place after a one hour break, during which Deputy Sharp had communicated with Sergeant Arthur at the crime scene.

Deputy Sharp initiated discussion of the three Mexicans by asking "if there was anyone around [Josh's] house yesterday that didn't belong there," to which Josh responded "yes." Then, through yes-or-no questioning and hand squeezes, Deputy Sharp purportedly learned that "at approx. dusk there was an older model Chevy Impala, blue in color, four-door, no primer, that had pulled into the driveway of his residence." The vehicle was "definitely a low rider." Through the hand-squeeze

method, Josh purportedly provided a detailed description of the three men in the car, including precise height, build, hair color and length, style and color of clothing, age ranges, and nationalities.

After this detailed description, Josh gave the first response that we know is false. Deputy Sharp wrote, "I asked the victim if his family owned a white station wagon. The reply was in the negative." ER 1404. (In fact, we know that the family owned a white station wagon.) The question that allegedly followed formed the basis for the prosecutor's claim at trial that Josh was merely "confused" and had no actual recollection of his assailants: "I then asked him if he felt these [the Mexicans] were the people that were in his house this morning when everything went crazy, to which he advised in the affirmative." When Deputy Sharp "again asked the victim if he was sure it was three Mexicans rather than three white male adults[,][t]he victim advised of the three Mexicans. The victim then moved his shoulders and appeared to be confused." At that point, the interview terminated as doctors took Josh into surgery. Deputy Sharp conceded at trial that he did nothing in asking his questions to try to distinguish for Josh between the three Mexican males and the three or four white males he had initially identified as his assailants. 1/8/85 RT 6038-40.

Over the course of the interview, Deputy Sharp spoke with Sergeant Arthur (who was at the crime scene) three times on the telephone. Despite what Deputy Sharp later wrote in his report, officers at the crime scene on that day-including Detective Hector O'Campo-learned that Josh had described his

assailants as three white men. ER 1315. The communications are confirmed by the police log of the attack, which was entered sometime between 2:06 p.m. and 2:29 p.m., describing as suspects "three young males" driving the Ryens' station wagon. ER 3688; 8/13/04 RT 73. Given the times in the police log, Deputy Sharp must have communicated this information to Arthur either before he started ***612** questioning Josh or within a few minutes of initiating contact. 1/4/85 RT 5973-75.

On June 6, Sergeant Arthur assigned SBCSD Detective O'Campo to make contact with Josh. At trial, Detective O'Campo denied talking to Josh about suspects or what happened during the attack at any point prior to a formal interview with Josh on June 14, 1983. ER 1322. Yet hospital personnel confirmed that Detective O'Campo did speak with Josh about a Mexican in a red shirt prior to that date. ER 1302, 1307-09. Further, both Josh's grandmother and a nurse on duty on June 6 testified that Detective O'Campo asked Josh substantive questions on that date, and that Detective O'Campo took notes about what he was learning. ER 1306-09; 1/14/85 RT 6303-11, 6326-27; 2/7/85 RT 7795-96. At trial, Detective O'Campo initially lied, denying that he took any notes on June 6. He then admitted that he destroyed his June 6 notes on June 8, after typing up a report. The documentation that Detective O'Campo had submitted to the SBCSD as of October 1983 gives no indication he had even spoken with Josh on any date other than June 14. Yet Detective O'Campo eventually admitted at trial that he had spoken with Josh approximately twenty times during Josh's stay at the hospital, meeting with him

almost every day during that period. ER 1316-17; 1/9/85 RT 6076-84.

Detective O'Campo admitted at trial that sometime between June 6 and June 9, he became convinced in his own mind that Cooper was responsible for the murders. He admitted that he had a very strong desire for Cooper to be convicted, and that he had more than a mere belief that Cooper was responsible-he *knew* that Cooper was responsible. 1/9/85 RT 6095-96. SBCSD Captain Schuyler, commander of the public affairs division, made clear at trial that by June 6 or 7, after Cooper had become a suspect, the SBCSD's publicly stated position was that Josh could not provide any useful information. 1/15/85 RT 6423-24. Captain Schuyler testified on cross examination that he had "probably" been the source of an Associated Press story reporting that Josh had told investigators that three Mexicans in a blue car had come to the Ryen house during the day before the killings. *Id.* at 6422-23. No public mention was made of the fact that Josh had told Gamundoy, before any SBCSD detectives had arrived at the hospital, that the killers had been three or four white men.

On June 14, 1983, Detective O'Campo interviewed Josh about what he remembered about the attacks. Josh was now able to speak. Breaking with his standard policy of tape-recording formal interviews, Detective O'Campo only took notes on what Josh said. He testified at trial that he destroyed his notes after writing his report the following day. 1/9/85 RT 6097-98. At trial, Detective O'Campo conceded that he could think of no reason

not to tape record the interview other than to "shape the context that the interview is presented [and] shape the information that is presented in the report." 1/9/85 RT 6103.

Dr. Jerry Hoyle, a psychologist at the hospital, observed the entire June 14 interview between Josh and Detective O'Campo. During the interview, Dr. Hoyle took notes to assist with Josh's treatment. Dr. Hoyle's testimony at trial showed that Detective O'Campo's report of the interview had distorted what Josh had said. For example, Josh had used the words "they" and "them" to refer to his assailants, while Detective O'Campo's report referred to only one attacker. ER 1434, 1330-32, 1422-28.

SBCSD Reserve Deputy Simo guarded Josh for part of the time he was in the *613 hospital. Deputy Simo testified that on the evening of June 15 he was playing Uno with Josh when the television news came on. The program displayed a photograph of Kevin Cooper, with his hair combed out in a natural "Afro" hairstyle. Josh stated without prompting that Cooper was not the person "who did it." Within fifteen minutes, Deputy Simo called Detective O'Campo to report what Josh had said. ER 1338.

As a volunteer deputy, Deputy Simo was not responsible for preparing reports. Rather, Detective O'Campo had that duty. 1/10/85 RT 6183-84. Detective O'Campo returned Deputy Simo's call that evening. Deputy Simo testified that Deputy O'Campo told him that "he knew about that information, that he had talked to-there was three Mexicans that had come previously, apparently

looking for a job, and it could have been, either because of the trauma it was some flashback on that," and that Deputy O'Campo suggested to Deputy Simo that the reason Josh made the statement that it wasn't Kevin Cooper was because of Josh's trauma. 1/15/85 RT 6404-05. No one from SBCSD took an official report from Deputy Simo. In May 1984, Deputy Simo saw newspaper articles about Josh and contacted Detective O'Campo again. Only then did Detective O'Campo ask Deputy Simo to come down to the station so that Detective O'Campo could make a report. 1/15/85 RT 6405-06.

Soon after Josh made this statement to Deputy Simo, he made a similar statement to his grandmother, Dr. Mary Howell. Cooper's picture appeared on television. Dr. Howell asked Josh whether he had ever seen Cooper before. Josh responded no. ER 1344-45.

Dr. Lorna Forbes is a psychiatrist specializing in treating children who have survived the murder of a family member. She began treating Josh in October 1983. On December 1, 1983, six months after the attacks, Dr. Forbes audiotaped an interview with Josh using questions submitted by Cooper's defense counsel. This was one of the two interviews played for the jury during Cooper's trial.

Dr. Forbes questioned whether Cooper committed the murders. In a sworn declaration dated October 30, 1999, she stated that she had "kept in touch with Josh and Dr. Howell from our first contact and to this day." *Cooper v. Calderon*, No. 99-71430, Exhibits to Petition for Writ of Habeas Corpus, Ex.

74 (S.D.Cal.1999). While professionally and ethically bound to maintain any confidences Josh shared with her during the course of treatment, Dr. Forbes urged the court in 1999 to pursue all opportunities to exculpate Cooper. She stated, "I have maintained the opinion that it would have been extremely difficult for one person to have committed the four murders and the assault on Josh.... It is in my mind that it is imperative that a DNA test is performed to assure as much as possible that an innocent man is not executed." *Id.*

In his tape-recorded interview with Dr. Forbes, Josh said that he saw a person with a "puff of hair" standing over his mother during the attack. He made a similar statement to his grandmother in May of 1984. 1/10/85 RT 6173 (in camera statement of Mr. Negus). It is almost certain that Cooper did not have a "puff of hair" at the time of the murders. It is undisputed that Cooper's hair was braided when he escaped from prison on June 2. His hair was also braided on June 5, the day after the murders. A hotel clerk in Tijuana, where Cooper arrived at 4:30 p.m. on June 5, testified that Cooper had braids when he arrived. Another hotel clerk, who did not testify, provided a sworn statement that Cooper had his hair in braids. However, pictures of Cooper that ***614** appeared on television after the murders show him wearing a large Afro-that is, they show him with a "puff of hair."

The prosecutor excised the "puff of hair" statement from the audiotape that was played to the jury. The excision of the reference to the "puff of hair" meant that Cooper's attorney did not argue to

the jury that Josh could not have seen Cooper with a "puff of hair" during the killings, and that Josh was confusing what he saw on the night of the killings with what he saw later on television. It also meant that the prosecutor could plausibly represent to the jury that "Josh told the same basic story."

(c). Josh Ryen's Testimony at the District Court Hearing

At the invitation of the district court, Josh Ryen delivered an in-person unsworn statement at the end of the final day of the 2004-2005 hearing on Cooper's second habeas application. Josh testified on April 22, 2005:

> The first time I met Kevin Cooper, I was eight years old and he slit my throat. He hit me with a hatchet and put a hole in my skull. He stabbed me twice, which broke my ribs and collapsed one lung.
>
> ....
>
> Every time Kevin Cooper opens his mouth, everyone wants to know what I think, what I have to say, how I'm feeling, and the whole nightmare floods all over me again. The barbecue, me begging to let Chris spend the night, me in my bed, Chris on the floor beside me. My mother screams, Chris gone, dark house, hallway, bushy hair, everything black, mom cut to pieces, saturated in blood, the nauseating smell of blood.

> .... Helicopters give me flashbacks of the life flight and my Incredible Hulks being cut off by paramedics. *Bushy hair* reminds me of the killer. Silence reminds me of the quiet before the screams. Cooper is everywhere. There is no escaping him.

4/22/05 RT 129-133 (emphases added).

The district court denied Cooper's counsel's repeated requests to allow discovery concerning Josh's memory and his testimony at trial. The court also denied Cooper's counsel's request to cross examine Josh at the habeas hearing. Immediately after Josh's statement at the hearing, the district court required Cooper's attorneys to make their closing arguments.

The district court denied Cooper's habeas application from the bench the same day Josh testified. The court stated:

> I do recognize that the victims who came today are technically under the federal law-it's not mandated or it's analogous they're not required to speak. But I did think *for completion of the record*, it is helpful for any reviewing court to at least hear their statements about their views of the matter. And so the Court recognizes your objections, but believes that because it's a case of major importance, that it's appropriate to give the victims a say. And it was not a significant period of time, but it

> does *complete the record* for the reviewing court.

4/22/05 RT 182 (emphases added). Given the district court's refusal to permit discovery and cross examination, Josh's unsworn testimony at the end of the habeas hearing hardly "completed the record."

Instead, Josh's testimony at the 2004-2005 hearing raised new questions. In its order denying Cooper's habeas petition, the district court wrote that the videotape and audiotape interviews benefitted Cooper because "[t]he defense also avoided the drama and sympathy that would have undoubtedly occurred had the defense called ***615** victim Josh Ryen to the stand in the trial *and heard his firsthand recollection about a man with bushy hair*." Dist. Ct., 510 F.3d at 1000 (citing 4/22/05 RT 133) (emphasis added). Josh's testimony in 2005 was the first time Josh made an in-court statement that he had seen someone with "bushy hair" during the attack. If Cooper's attorneys had been permitted to question Josh in the 2005 hearing, they could have asked him about his recollection of the attacker's "bushy hair" (or "puff of hair"), and could have pointed out that it was extremely unlikely that the man with "bushy hair" on the night of June 4-if, indeed, there was such a man-was Cooper.

ii. Drop of Blood A-41

A drop of blood was found by Deputy Baird on the wall in the hall across from the master bedroom in the Ryen house. Chips of paint with the blood on them were taken from the wall and labeled "A-41."

The State introduced evidence at trial through SBCSD Criminologist Daniel Gregonis that his testing of A-41 showed that its blood characteristics matched those of Cooper. During deliberations the jury requested that Gregonis's testimony about A-41 be read back. 2/11/85 RT 7864-65. This was the second of only two read-backs requested by the jury. (The other was Josh's audiotaped interview with Dr. Forbes.)

There is a strong likelihood that the results of the blood tests performed on A-41, presented at trial, were false evidence. There is also a strong likelihood that state actors tampered with A-41 to ensure that it would generate inculpatory results when Cooper's post-conviction DNA testing was conducted in 2002.

Gregonis delayed most of his testing of A-41 until he had information about Cooper's genetic profile-that is, until he knew what he had to match. He then delayed doing the most sensitive and discriminating tests of A-41 until after Cooper had been arrested and had the vial of Cooper's blood (vial VV-2) in his lab. Without contacting Cooper's counsel, Gregonis re-ran tests that consumed more of the limited sample that constituted A-41. Gregonis then tested a known sample of Cooper's blood side by side on the same testing plate with A-41, but initially denied doing so and represented under oath that he had tested the samples blind. ER 761.

When the results of Gregonis's tests on A-41 were initially inconsistent with Cooper's expert's results for a known sample of Cooper's blood, Gregonis

altered his lab notes and claimed that he had misinterpreted his results. ER 747. Here is some of Gregonis's trial testimony:

> Q [by Cooper's attorney]: Did you change your mind about A-41 after you learned that if your original call was accurate, A-41 couldn't have come from Mr. Cooper?
>
> A [by Gregonis]: Not immediately, no. But it was after. Yes.
>
> Q: Prior to your learning that if your original call about A-41 was correct, then it couldn't have come from Mr. Cooper, how many times did you testify on the witness stand, under oath, that A-41 was a B and nothing else but a B?
>
> A: It is probably about three times.
>
> Q: And your explanation was that it was a technical fault on your part, you made a mistake?
>
> A: Essentially, yes.

ER 746.

The blood sample in A-41 has had a disturbing pattern of being entirely "consumed" in the testing, and then reappearing in a form that could be subjected to further testing. Gregonis had initially ***616** used so much of the limited sample (or so he said) that when the parties finally did joint testing, they were forced to place the remaining tiny flakes of

white paint in a liquid solvent to dissolve any remaining blood. The sample was so small that their results were largely inconclusive. All of the chips that had had any traces of blood on them were discarded. ER 722-23; 12/6/84 RT 4543-47; 1/30/85 RT 7380-87. Then, in early July 1984, "just out of curiousity [sic] sake, [Gregonis] ... open[ed] the[A-41] pillbox and saw a very small quantity of blood remaining." ER 722-24; 12/6/84 RT 4548. The parties tested those remaining small specks of blood in October 1984, and again the results were inconclusive. 12/5/84 RT 4442-45.

In August 1999, Gregonis checked A-41 out of the evidence storage room for one day. ER 1629, 2650-54. When Cooper's post-conviction DNA testing took place in 2002, a "bloodstained paint chip" and "blood dust" had inexplicably, and conveniently, appeared in the A-41 canister. ER 790. The blood on that chip was tested, and Cooper's DNA was found. The appearance of a blood-stained chip in 2002 is, to say the least, surprising, given that Gregonis had testified at trial that in the October 1984 testing of A-41 they had processed and discarded all of the paint chips with blood on them. ER 722-23.

In the 2004-2005 habeas proceeding, Cooper requested EDTA testing of A-41. Without taking evidence on the feasibility of testing any remaining A-41 for the presence of EDTA, the district court rejected Cooper's request. Dist. Ct., 510 F.3d at 948-50; ER 3467; 6/29/04 RT 209.

iii. Pro-Ked Shoeprints

Three matching shoeprints made by a Pro-Ked Dude shoe were critical evidence against Cooper at trial. According to testimony at trial, one was a bloody print found on a crumpled sheet in the master bedroom of the Ryen house. Another print was found on a spa cover at the Ryen house outside the master bedroom. The third print was found in dust on the floor inside the Lease house near a pool table.

I discuss below difficulties with the evidence about whether Cooper was, or could have been, wearing Pro-Ked Dude shoes. For the moment, I am concerned only with the suspicious circumstances under which the shoeprints were purportedly found.

The most suspicious of the shoeprints are the two found at the Ryen house. The most incriminating was the bloody print purportedly found on the crumpled sheet in the master bedroom. At trial, only one person testified that he saw the bloody print while the sheet was still in the bedroom. That person was SBCSD Deputy Duffy. No one else claimed to have seen the bloody print while the sheet was still in the bedroom. However, Deputy Duffy had testified under oath at Cooper's preliminary hearing that he had *not* seen the print in the master bedroom. ER 706, 1557. If Deputy Duffy was telling the truth at the preliminary hearing, no one saw the bloody print on the sheet while it was in the bedroom. If Deputy Duffy was telling the truth at the preliminary hearing, he lied at trial.

SBCSD Deputies Stockwell and Schecter picked up the crumpled sheet from the master bedroom after 5:20 p.m. on June 5. Neither Deputy Stockwell nor Deputy Schecter noticed the bloody print (if it was, indeed, there) when they picked up the sheet. They folded the sheet and packaged it to take it back to the crime lab for processing. Deputy Stockwell testified at trial that sometime later, in the crime lab, he refolded the sheet so it matched the way it had been crumpled on the floor of the master bedroom. He testified that this brought together the separated parts ***617** of a bloody Pro-Ked shoeprint on the sheet, which he was then able to see for the first time. Deputy Stockwell was unable to specify when he made this discovery. ER 708; 11/19/84 RT 3506-07; 11/21/84 RT 3698. Deputy Baird, the manager of the Crime Laboratory where the sheet and the other critical physical evidence was kept, testified at trial that he had matched the newly discovered shoeprint to a Pro-Ked Dude shoe that he already had in the lab. (Recall that it was also Deputy Baird who found the drop of blood, A-41, in the hall in the Ryen house.) Soon after the trial, Deputy Baird was caught stealing heroin from the SBCSD evidence locker for his own use and for distribution to others. ER 1714-16.

The other shoeprint at the Ryen house was on the spa cover outside the master bedroom. That print was discovered after some delay. Several people testified that, even after the print was purportedly discovered, that they had looked at the spa cover and had not seen the print. SBCSD Sergeant Arthur, head of the investigation, testified that he pointed the print out to Deputy Duffy at approximately

2:07 p.m. on June 5, but Deputy Duffy testified that he did not know about the shoeprint until Detective O'Campo pointed it out to him at sunset that day. SBCSD Sergeant Gilmore testified that he did not see any footwear impressions on the cover on the afternoon of June 5. 12/18/84 RT 5160-63; 11/15/84 RT 3363-64, 3396, 3299. Deputy Smith, who was ordered to sketch all of the shoeprints on the spa cover on the morning of June 8, three days later, testified that she sketched all of the prints that she saw on the spa cover. However, none of her sketches matched the print of a Pro-Ked Dude shoe. An unidentified officer directed her back to the spa cover later on June 8. She then saw a Pro-Ked Dude print that she had not previously seen. 1/22/85 RT 6869, 6871-73, 6878-79.

The spa cover was left out in the open, moved several times, and stepped on by at least one deputy before it was taken into evidence. Then the shoeprint was destroyed, purportedly in a failed effort to lift and preserve the image. 11/15/84 RT 3297-98; 11/19/84 RT 3447-48.

If the shoeprints on the sheet and the spa were planted, it does not matter much whether a matching Pro-Ked Dude shoeprint near the pool table in the Lease house was also planted. It is possible that Cooper was, in fact, wearing Pro-Ked Dude shoes while he was staying at the Lease house. If the print in the Lease house was not planted, this would only mean that the prints in the Ryen house were put on the sheet and the spa cover to match the print that had been found in the Lease house.

But the shoeprint in the Lease house could also have been planted. The day before the Lease house search began and the Pro-Ked Dude shoeprint was discovered, the front door to the house had been left unlocked and other evidence was likely planted in the house. (See the discussion below of the hatchet sheath and jacket button.) 1/29/85 RT 7312. The print in the Lease house was discovered after some delay, after approximately twelve people had walked through the house. 1/23/85 RT 6956-58. Deputy Baird testified that the shoeprint had been "marked off so that it would not be stepped on" by midafternoon of June 7. 11/12/84 RT 4760. Deputy Smith, who arrived at 8 p.m. that day to draw sketches of the prints, testified that nobody had instructed her to sketch the print that turned out to be the Pro-Ked Dude print. Instead, she testified that she discovered that print on her own after first sketching several other prints she was instructed to sketch and then walking around the house to look for more suspicious*618 prints. Contrary to Deputy Baird's testimony, Deputy Smith gave no indication that the Pro-Ked Dude print had been marked off at the time she sketched it. 11/22/85 RT 6864-72.

iv. Cigarettes and Tobacco

Cigarette and tobacco evidence presented at trial connected Cooper to the Ryens' white station wagon. Recall that the station wagon was found in a church parking lot in Long Beach, 45 miles west of the Ryen house, seven days after the crime. Recall also that Cooper arrived at a hotel in Tijuana, Mexico, 125

miles south of the Ryen house, at 4:30 p.m. the day after the murders.

Cooper had left evidence in the Lease house that he was rolling his own cigarettes, using prison-issued "Role-Rite" tobacco. Tobacco consistent with Role-Rite was purportedly found on the floor between the front passenger seat and the front passenger door of the Ryens' station wagon. Two cigarette butts were also purportedly found in the car. One appeared to be made with Role-Rite tobacco. The other was a commercial filter cigarette. One of the cigarettes contained evidence that it had been smoked by someone with blood type A (Cooper's blood type, and, according to Gregonis, the blood type of about 40% of the population), but testing before trial did not reveal any further information. ER 748-49.

SBCSD deputies had ample opportunity to plant incriminating cigarette and tobacco evidence in the Ryens' station wagon. Most of the cigarette butts that Cooper left behind in the Lease house were never processed into evidence. ER 894, 834-35. Their whereabouts is unknown. Cooper's own car had been impounded in Los Angeles after he was imprisoned at CIM on the burglary charge. A hand-rolled cigarette butt recovered from Cooper's car had been taken into evidence, but it disappeared prior to DNA testing. ER 895, 897; 6/23/03 RT 109-10, 113, 134-35. Role-Rite tobacco in a white box was recovered from the closet of the bedroom in the Lease house previously used by Katherine Bilbia ("the Bilbia bedroom"), but it was never weighed or otherwise measured. SBCSD Deputy Mascetti

obtained a paper bag of assorted smoking tobaccos from CIM. ER 3185.

When police formally took into custody the station wagon in the church parking lot in Long Beach, the rear door was already unlocked. The cigarette butts and tobacco in the car were not noted in the initial visual inspection of the car. Nor were they noted when the interior of the car was first processed for evidence. They first appear on a handwritten, undated, unsigned list of vehicle contents. ER 806-11, 836-37. Finally, the cigarette and tobacco evidence from the car has a perplexing history much like that of A-41. The paper from the hand-rolled butt supposedly found in the car had supposedly been entirely consumed in testing in 1984. At the time of the testing, the paper was 4 millimeters long. The paper "reappeared" in 2001, just in time for DNA testing. When it reappeared, it had grown to 7 millimeters by 7 millimeters square. ER 978-79, 4947, 3170. Perhaps not coincidentally, the hand-rolled cigarette butt from Cooper's own car had disappeared prior to the DNA testing.

v. The Hatchet Sheath and Button

On June 6, the day after the bodies were discovered, two deputies did a sweep through the Lease house, purportedly to check for possible assailants. During this sweep they were aware that the department had recovered a bloody hatchet from beside the road near the Ryen house, and that it was a suspected murder ***619** weapon. However, they did not report finding any evidence in the Lease house. Other deputies returned the following day to

conduct another search. Those deputies discovered a hatchet sheath and a green, blood-stained button in the Bilbia bedroom, in plain view on the floor near the closet. 10/29/84 RT 2732-33; 10/30/84 RT 2838-40, 2846; 10/31/84 RT 2905-08. (The district court erroneously wrote that the deputies found the sheath "*near* the bedroom." Dist. Ct., 510 F.3d at 898 (emphasis added).) The bedroom was virtually empty, which would have made the sheath (and, indeed, the button) very easy to see. The bedroom had no furnishings other than a headboard.

One of the deputies who conducted the initial sweep of the Lease house denied ever setting foot in the Bilbia bedroom, where the other deputies later found the hatchet sheath. However, processing of physical evidence in the Lease house later showed that this was a lie. Several of that deputy's fingerprints were found on the inside of the closet of the Bilbia bedroom where the hatchet sheath and button were found. The deputy's insistence that he had never set foot in the bedroom, the presence of the deputy's fingerprints inside the closet of the bedroom, the failure of the deputy to find the sheath and button in plain view on the floor near the closet, and their "discovery" the next day strongly suggest that the hatchet sheath and button were planted in the Bilbia bedroom.

Further, the button found on the floor of the Bilbia button was green. That means that it came from a green prison-issued jacket. However, Cooper testified that he was wearing a brown or tan prison jacket. 1/2/85 RT 5331, 5355-57; 1/3/85 RT 5567-68. Cooper's testimony was confirmed by Lieutenant

Cornelius Shephard, who worked at the prison. On June 2, Lieutenant Shephard was driving near the prison and saw Cooper. He testified that Cooper was wearing "what appeared to be prison jacket and blues." 10/24/84 RT 2388. He was "jogging toward me ... [and][h]is hair was in braids." *Id.* at 2389. Lieutenant Shephard's written report stated that Cooper was wearing a jacket that was "brown in color." *Id.* at 2408. In his testimony at trial, he described Cooper's jacket as "brownish." *Id.*

b. Summary

In sum, if EDTA testing shows that Cooper's blood was planted on the tan t-shirt, that showing would greatly increase the likelihood that the State introduced false evidence at trial. Indeed, in my view, the likelihood would then be so strong that the district court would be obliged to find that the State did so.

That evidence at trial was Josh's two recorded interviews in which he stated that he saw a single man or single shadow in the house during the murders; the drop of blood labeled A-41 that Gregonis testified was consistent with Cooper's blood; the bloody Pro-Ked Dude shoeprints found on the sheet in the master bedroom and on the spa cover at the Ryen house (and probably the print found in the Lease house as well); the Roll-Rite cigarettes and tobacco found in the Ryen station wagon in Long Beach; and the hatchet sheath and button found in the Bilbia bedroom in the Lease house.

Even with this evidence, the State's case against Cooper was weak. (I will elaborate on this point below.) Without this evidence, the State would not have been able to obtain a conviction against Cooper. That is, if this evidence was false, Cooper would be able to make a showing of actual innocence under either the standard of *Schlup* or of 28 U.S.C. § 2244(b)(2)(B)(ii).

*620 B. *BRADY* CLAIMS

Cooper contends that the State violated *Brady* in several respects. The most important of those are (1) the failure to provide Warden Midge Carroll's information that Pro-Ked Dude shoes at the prison were not special prison-issue shoes; (2) the failure to provide the Disposition Report showing that a Senior Deputy approved the destruction of Lee Furrow's bloody coveralls, and the failure to preserve and make the coveralls available; and (3) the failure to provide SBCSD daily logs showing that an apparently bloody blue shirt had been found, and the failure to preserve and make the shirt available. I consider these contentions in turn.

1. THE PRO-KED DUDE SHOES

At trial, the prosecution presented evidence that prints made by a Pro-Ked Dude tennis shoe were found on a bloody sheet in the master bedroom in the Ryen house, on the spa cover at the Ryen house, and in the Lease house. To tie those shoeprints to Cooper, the prosecution presented testimony by Michael Newberry, General Merchandise Manager for Pro-Keds Division of Stride Rite Corporation,

that the Pro-Ked Dude is "a tennis shoe that is manufactured only for institutions," is "supplied strictly for prison use within the State of California," is "unavailable for retail stores within California," and is not "sold on the street." 10/23/84 RT 2281; 2/7/85 RT 7749, 7752. Newberry testified at trial that to the best of his knowledge the Pro-Ked tennis shoe is not "sold across the counter on a retail basis in any state in this country," and he confirmed that "the only place those shoes arrive, if those arrived in California, is in some type of state facility." 10/ 29/84 RT 2624, 2621-22.

Shortly before Cooper's scheduled execution in 2004, now-retired Warden Midge Carroll provided a sworn declaration in support of Cooper's motion to file a second or successive federal habeas application. She stated in her declaration, dated January 30, 2004, that after reading newspaper reports during the investigation into the Ryen/Hughes murders in 1983, she had conducted "a personal inquiry of the appropriate staff, including the deputy warden, the business manager responsible for procurement, and the personnel responsible for ware-housing," and as a result of that inquiry she had concluded that the investigators' assertion that the shoeprints tied to the crime scene "likely came only from a prison-issue tennis shoe was inaccurate." *Id.*; see ER 1680-82. She stated that she had conveyed this information to the SBCSD, but that the information was not provided to Cooper's trial counsel.

Inmate James Taylor, who worked in the recreation equipment room at the prison, testified at

trial that he personally gave Cooper a pair of P.F. Flyer shoes, and then allowed Cooper to trade those shoes in for a pair of Pro-Ked Dude tennis shoes just days before Cooper's escape. ER 1689; 10/25/84 RT 2547-48. However, in a sworn declaration, dated January 8, 2004, submitted in support of Cooper's motion to file a second or successive application, Taylor stated that he had not told the truth at trial. Contrary to his trial testimony, Taylor now stated that he had issued Cooper only one pair of shoes-P.F. Flyers-and that Cooper had not traded the P.F. Flyers in for a pair of Keds or any other shoes. ER 1678-79.

An en banc panel of this court held in 2004 that Warden Carroll's declaration, in combination with inmate Taylor's declaration, was enough to make out a *prima facie* showing of a *Brady* violation. *Cooper*, 358 F.3d at 1121. Based on this *prima facie* showing, the en banc panel ***621** granted Cooper permission to file a second or successive federal habeas application.

During the district court hearing in 2004-2005, now-retired Warden Midge Carroll, Stride Rite executive Don Luck, and inmate James Taylor all testified. I discuss their testimony in turn.

a. Warden Midge Carroll

Warden Midge Carroll testified that in 1983 she was the Warden of CIM, the prison in which Cooper had been incarcerated. At the district court hearing, Carroll testified that during the investigation of the murders, she became concerned that the SBCSD was

describing shoeprints found at the scene as being from "a prison-made tennis shoe, a special shoe that had to come from a prison." She testified that she knew CIM did not have prison-manufactured tennis shoes, and she directed her staff to "look into this special shoe and get back to me." 6/2/04 RT 102. Her staff reported back that "there was no special shoe, that the shoes we had and that we issued were common, ordinary shoes that were commonly manufactured and sold in retail stores." *Id.* at 103-04. Carroll testified that she then called the SBCSD and shared this information with one of two lead detectives, whose name she could not now recall. *Id.* at 104-05. Carroll testified that she "felt a little put off by" the detective's response. *Id.* at 107-08. She testified that she made a couple of additional attempts to contact the SBCSD about the issue, but her calls were not returned. *Id.* at 108-09.

Carroll also testified that there were a few inaccuracies in her January 30, 2004 declaration. For example, she testified that she did not keep records of all of her contacts with the SBCSD about the Cooper case, and that she had not "kept meticulous records of all matters stemming from Mr. Cooper's case, including [her] contacts with detectives." *Id.* at 147, 172. She also testified that she did not keep records of her telephone conversations. *Id.* at 198.

SBCSD Detective Derek Pacifico testified during the district court hearing that he could find no record that Carroll had communicated with the SBCSD. He testified that he had reviewed "all of the files and materials in the custody of the Sheriff's

Department relating to the Kevin Cooper case" and could not find "any indication of any contact from Ms. Carroll." 6/3/04 RT 46-47. Detective Pacifico had been with the department only since 1990. On cross-examination, Detective Pacifico conceded that he had not spoken with anyone who had worked on the case in 1983, and did not know more than two names of officers who had been involved with the investigation. *Id.* at 49-50. He also admitted that he was not familiar with the SBCSD paperwork for processing telephone calls in 1983, and he conceded that although the files included the standard pink "missed your call, please call" slips, "I would guess that you wouldn't take a message ... if someone is live to answer the phone." *Id.* at 53-54.

b. Stride Rite Executive Don Luck

Stride Rite executive Don Luck also testified at the district court hearing. Luck had managed the Keds shoe line for fortyone years before his retirement. Luck's testimony directly contradicted Newberry's trial testimony that the Pro-Ked Dude was not "sold across the counter on a retail basis in any state in this country." 10/29/84 RT 2624. Luck stated that no large chains on the West Coast sold Pro-Ked Dudes in the early 1980s, and he stated that the market for Pro-Keds was generally weak in the West. But he testified that Pro-Ked Dudes "enjoyed a good business" in retail stores in New York; ***622** that he "did lots of thousands of pairs in the five boroughs of New York"; and that the demand "splash[ed] on down to Atlanta." 6/2/04 RT 239-40. Luck testified that smaller chains and individual stores, including those on the West Coast,

could order Pro-Ked Dudes through the wholesale catalog. He also left open the possibility that major chains east of Chicago may have sold Pro-Ked Dudes. He conceded that the Pro Ked Dude sold to institutions was the "[s]ame shoe, same storage, same shipment point" as the Pro Ked Dude sold to retail outlets through the catalog. *Id.* at 239.

Michael Newberry, who had testified as the Stride Rite representative at the 1983 trial, now lives and works in China. The district court initially proposed that the parties conduct a deposition on written interrogatories. 4/2/04 RT 3-4. On May 7, 2004, Cooper's counsel submitted to the court a list of twenty proposed questions for Newberry. ER 127-30. The district court, however, never authorized the deposition on written interrogatories.

c. Inmate James Taylor

Inmate James Taylor testified at trial that he had issued Pro-Ked Dudes to Cooper just before his escape. At the 2004-2005 hearing in the district court, Taylor could not provide a version of events contradicting his trial testimony without risking perjury charges.

In early May 1983, Taylor began working in the equipment room of the CIM gym, where he issued athletic shoes and other equipment to inmates, and where he had regular access to television. 10/24/84 RT 2466; 1/28/85 RT 7189-90. Five days after the murders, on June 9, 1983, two SBCSD deputies went to CIM and met with Taylor's supervisor in the gym, correctional officer Alfred Hill. That same day,

Taylor had heard news reports that the SBCSD was trying to connect tennis shoes with Kevin Cooper, and that Cooper was the primary suspect. After the SBCSD deputies left, Hill told Taylor that the deputies had been looking into shoe impressions, and that the deputies had specifically mentioned a diamond-shaped pattern. 10/25/84 RT 2507-08, 2524-26; 1/28/85 RT 7199-7201. Taylor went that day to Recreation Supervisor Skip Arjo to report that he had information about Cooper. 10/24/84 RT 2477-78.

On June 10, CIM Investigators Murray and Hernandez conducted a tape-recorded interview with Taylor. In the interview Taylor stated that he knew Cooper from the basketball team and that he had given Cooper both Pro-Ked *and* P.F. Flyer tennis shoes. He stated that "[s]omehow, somewhere or another [Cooper] got them, come up with some Pro Keds." 10/25/84 RT 2555. Murray wrote a two-paragraph report of the interview dated June 12, 1983. The report did not mention that the interview had been tape recorded, nor did the report mention P.F. Flyers. The tape was not transcribed until early December 1983 and was not made available to Cooper's attorneys until well after the beginning of the preliminary hearing. 1/28/85 RT 7183-88.

Taylor's testimony was the only testimony at trial that definitively placed Pro-Keds on Cooper's feet. His testimony was not consistent with that of the correctional officer who provided Cooper with his tennis shoes. Cooper had a medical problem with one of his feet and therefore when he arrived at CIM

he obtained a "chrono" which entitled him to wear soft-soled shoes. On May 3, Sidney Mason, a search and escort correctional officer, assisted Cooper with filling the chrono. Officer Mason testified that he got the shoes from "a Latin officer that worked in ... Palm Hall." 1/28/85 RT 7175-77, 7181. Officer ***623** Mason testified that the officer came out with "the standard issue Keds, hi-top black type tennis shoes" size "either 9's or 10's. I remember asking two sizes in case one size was out." *Id.* at 7175-77. Officer Mason originally told Cooper's investigator, in a tape-recorded statement, that the shoes "had appeared to me to be Keds, a black and white high top type" and that "I do believe they were used because that would be all that they issued at that time that they had on hand." *Id.* at 7178-79; 1/29/85 RT 7318; 2/7/85 RT 7805. At trial, however, Officer Mason testified that the shoes were new because they were in a box. 1/28/85 RT 7178-80.

Cooper's testimony was consistent with Officer Mason's, except that Cooper consistently maintained that the shoes he was given were old. 1/2/85 RT 5332-41. Cooper testified that he did not know what type of tennis shoes they were. Cooper testified that it was "safe to say" that he was "not paying attention to the shoes at that particular time." 1/3/85 RT 5553.

Taylor's testimony was critical to Cooper's conviction. On March 7, 1985, a CIM internal investigator recommended to Warden Carroll that Taylor be given a reduction in his sentence based on his "testimony [that] implicated Mr. Cooper in the Chino Hills murders." ER 376-77. On March 11,

District Attorney Kottmeier wrote a supporting letter to Daniel McCarthy of the California Department of Corrections stating that "Mr. Taylor's testimony [that he had given Cooper a pair of shoes that were available only at institutions such as CIM] was of critical importance both at the preliminary hearing and at the jury trial." ER 5605-06. In affirming Cooper's conviction on direct appeal, the California Supreme Court specifically referred to Taylor's testimony that he gave Cooper a pair of Pro-Ked Dude shoes shortly before his escape from prison. *Cooper*, 53 Cal.3d at 797-98, 281 Cal.Rptr. 90, 809 P.2d 865.

Taylor's statements during the district court habeas proceedings have been incoherent. State investigators Derek Pacifico and Don Mahoney conducted a tape-recorded interview of Taylor on April 1, 2004, at Ironwood State Prison. FER 22-48. At various times during that interview, Taylor stated that Pro-Keds and P.F. Flyers are the same shoe, that P.F. Flyers are a particular model of Pro-Keds, that P.F. Flyers and Pro-Keds are different shoes, that P.F. Flyers are prison-made shoes, and that prison-made shoes are not called P.F. Flyers. By the end of the interview, Taylor's story was that in the morning he gave Cooper a pair of P.F. Flyers, which are also known as standard prison-issue shoes, and that later in the day he allowed Cooper to exchange those shoes for Pro-Keds. He stated that if he could change anything in his sworn affidavit of January 8, 2004 (I quote this so that the reader can get the full flavor of Taylor's incoherence), he would "distinguish the fact of what I mean right here ... that I gave him a pair of

pf flyers the pro keds pf flyer pro keds not the pf flyer not the pro keds ah the pf flyer prison issue." FER 47.

Taylor testified in the district court on June 2, 2004. He testified that P.F. Flyer shoes are an "everyday, recreational situation shoe" that was "an institutional-made shoe" also known as "PIA tennis shoes." 6/2/04 RT 3-4. He testified that Pro-Keds, by contrast, were "specifically for the[basketball] team," and were "a better shoe." *Id.* at 3. He stated that he did not "understand that the [January 8, 2004] declaration stated that the only shoes that [he] ever provided to Kevin Cooper were P.F. Flyers." *Id.* at 8. He testified that he signed the declaration that described the shoes as P.F. Flyers because, "The lango***624** -that's what I was trying to-that's the only discrepancy that-from what I said 20 years ago to what I'm saying now to what I told her. These are also called P.F. Flyers. They're-the Pro Ked P.F. Flyers-they're-that's just what they're called. It's a lango." *Id.* at 12-13. As he was saying these words, he was pointing to a photograph of actual P.F. Flyers, not prison-manufactured shoes and not Pro-Keds. *Id.* at 13; ER 427.

Taylor testified in the district court that the statements in his January 8, 2004, declaration had not been written on the paper when he signed it, and when he initialed each line. 6/2/04 RT at 34-35, 56-58, 69. The following day, Sandra Coke, the private investigator who took Taylor's declaration, testified that she had been very careful in ensuring that the contents of the declaration accurately

reflected what Taylor intended to say. She testified that she wrote the declaration by hand in Taylor's presence, reviewing each line with Taylor as she wrote it. She denied that Taylor had ever claimed that he sometimes referred to Pro-Keds as P.F. Flyers or that the term P.F. Flyers referred to a prison-made tennis shoe. She further testified that she again met with Taylor approximately two months after the initial interview, when she showed him the declaration and informed him that he would likely be called upon to testify. She stated that Taylor reread the declaration and stated that "everything was accurate and that he had no changes, that he was satisfied with the declaration as it was written." 6/3/04 RT 92-99, 111.

d. District Court Conclusion

The district court concluded that the failure to provide Warden Carroll's information to Cooper was not a material *Brady* violation. First, the court wrote that Don Luck's testimony (which contradicted Newberry's testimony) "would not change the inculpatory nature of the shoeprint evidence.... [I]t was never assumed that the distribution of the shoes was limited to prison inmates; what mattered was that the shoes were linked to Petitioner." Dist. Ct., 510 F.3d at 979. Second, the court wrote that "Mr. Taylor's credible testimony at the evidentiary hearing corroborates his trial testimony that he gave Petitioner a pair of Pro-Keds Dude tennis shoes, which Mr. Taylor correctly identified by sight, and that Petitioner never returned those shoes. Mr. Taylor was simply confused by his interview with [Cooper's] investigator [.] ... [T]he Court concludes

therefore that there was no recantation by Mr. Taylor and that Petitioner had a pair of Pro-Keds Dude tennis shoes when he escaped from CIM." *Id.* at 978.

The district court was wrong on both counts. First, the district misstates the evidence at trial. That the distribution of Pro-Ked Dudes was "limited to prison inmates" was not "never assumed." Quite the contrary-it was "assumed"; indeed, it was shown by uncontradicted testimony of Stride Rite executive Michael Newberry. Newberry's testimony effectively eliminated the possibility that the shoeprints on the bloody sheet in the master bedroom and on the spa cover could have come from anyone other than an escaped prisoner. The California Supreme Court specifically relied on Newberry's testimony in affirming Cooper's conviction and death sentence. It wrote:

> The Stride Rite Corporation sells Pro Ked tennis shoes to the state for use in institutions such as CIM. All "Dude" tennis shoes contain the same sole pattern. The general merchandise manager for Stride Rite testified that this pattern is not found on any other shoe that the company manufactures nor, to his knowledge (which was extensive), on any other shoe. The shoes are not sold retail,***625** but only to states and the federal government.

Cooper, 53 Cal.3d at 798, 281 Cal.Rptr. 90, 809 P.2d 865.

Second, Taylor did not give "credible testimony corroborat[ing] his trial testimony." Rather, at the district court hearing Taylor gave a combination of incoherent and flatly incredible testimony. Nor did Taylor "correctly identif [y]" Pro Ked Dudes "by sight." Quite the contrary-during his testimony, he pointed at P.F. Flyers and said that they were Pro Ked Dudes.

It is still possible that Cooper received Pro-Ked Dudes from Officer Mason. But neither Officer Mason nor Cooper can say for certain whether those shoes were, or were not, Pro-Ked Dudes. The *Brady* evidence from Warden Carroll, the testimony of Don Luck, as well as Taylor's obvious lack of credibility, substantially increase the probability that Cooper was not wearing Pro Ked Dudes during the time he was in the Lease house.

2. THE BLOODY COVERALLS

As described in detail above, Lee Furrow's bloody coveralls were important evidence indicating that Furrow and two or three others may have been the killers. Diana Roper turned over the coveralls to SBCSD Deputy Eckley on June 9, 1983. At that time, she told him that she had reason to believe that Furrow had committed the murders. Deputy Eckley logged the coveralls into evidence at the Yucaipa Station of SBCSD. Less than six months later, Deputy Eckley destroyed the coveralls without telling Cooper's counsel.

Deputy Eckley testified at trial that he acted alone in discarding the bloody coveralls, and that in so doing he failed to follow SBCSD procedures for disposing of property. ER 4985-89. On December 1, 1998, Cooper's investigator discovered a Disposition Report for the coveralls dated December 1, 1983. This report had not previously been disclosed to Cooper. ER 3010, 4934. The report stated "destroyed no value coveralls." The initials "KS" were written on the bottom right side of the report. In February 1999, Cooper's investigator learned that "KS" was likely to have been Ken Schreckengost, a now-retired Senior Deputy in the property division of SBCSD. The investigator contacted Deputy Schreckengost, but Schreckengost refused to speak with him. Schreckengost told him, "I don't like [Cooper]. I won't help him," and hung up the phone. ER 3113. Schreckengost told a second investigator, "I know everybody who worked the case, I know all about it but I'm not going to say nothing.... They should have shot that son of a bitch when he escaped." ER 4902.

Deputy Eckley also refused to speak with Cooper's investigators. He told one investigator that he "could not add anything to the information which was written on the disposition report." ER 4917. Eckley told another investigator that he would not "say anything without his attorney, unless he is 'drug into court.'" ER 4939. He added that although he was retired from the SBCSD, "he owed them allegiance." ER 4790.

An investigator for Cooper contacted Deputy Schreckengost in February 2005. This time,

perhaps because the investigator was a former police officer, Deputy Schreckengost confirmed that the initials "KS" on the Disposition Report were his. He told the investigator, "If you are trying to help [Cooper], you are in the wrong place." Deputy Schreckengost stated that if proper procedures were followed no property associated with a murder would ever be destroyed, and that property with blood on it would have routinely been tested at least for blood type. ER 4787-89. ***626** We now know, based on Deputy Schreckengost's 2005 statement, that, contrary to Eckley's testimony at trial, Eckley did not discard the coveralls on his own. Instead, his action had been approved by his superior officer, Deputy Schreckengost. The fact that Deputy Schreckengost had approved the disposal of the bloody coveralls was material information that should have been revealed to Cooper under *Brady*.

This information would have impeached Deputy Eckley's testimony that he acted alone, and would have identified Deputy Schreckengost as the SBCSD officer responsible for the disposal. The SBCSD's lead investigator testified at trial, based on Deputy Eckley's testimony, that the reason the coveralls were never processed was "neglect." 12/19/84 RT 5261. We now know, based on Deputy Schreckengost's 2005 statement that his initials were on the Disposition Report, that a responsible officer of the SBCSD deliberately destroyed material evidence that should have been provided to Cooper.

If the prosecution had disclosed to Cooper prior to trial that Deputy Schreckengost had authorized the destruction of Furrow's bloody coveralls, his counsel could have questioned him at that time about the circumstances under which he had put his initials on the Disposition Report. More than twenty years later, during the district court hearing in April 2005, Deputy Schreckengost responded "I don't remember," "I don't know," or "I have no idea" more than fifty times. 4/1/05 RT 2-71. He purported not to remember anything about the policy manual or the rules for handling evidence. When asked, "Do you remember anything about signing off on this form?" he replied, "You know I don't. It's been 23 years." *Id.* at 31.

Deputy Schreckengost and Deputy Eckley are good friends. ER 4788. They rode to the district court hearing together. Both of them understood the value of a fading memory. In response to one question during the hearing in the district court, Deputy Schreckengost replied, "You're talking about stuff that happened many years ago. I can't remember what I had for lunch yesterday." 4/1/05 RT 68. When his turn came, Deputy Eckley similarly testified, "I can't remember what I ate two weeks ago." *Id.* at 103.

In April 2005, Eckley testified in the district court that he had thought the story told by Roper when she gave him the bloody coveralls "was a goofy story." He testified, "So in other words there's holes in the story. When I run it by the supervisors, we don't think the story had much credibility. But I

was told to take [the coveralls] as evidence and pass them on which is what I did." *Id.* at 151.

However, in a May 26, 1984, audiotaped interview with Cooper's investigator, Deputy Eckley said that he believed Roper's story: "She said that this guy had come from prison and that he has a rap for crimes like murder. I would believe that part, because the Kellison girls have a tendency or propensity to marry, live and shack-up with guys from prison." He also stated, "And then with my relationship with the Kellison's/Roper family I know their involvement in crime, as far as committing murders as well as giving up murderers." The investigator asked, "They've done this in the past?" Deputy Eckley replied, "Oh, yeh, they've given very good information on a murder before. One of their sons try to commit murder, tried to kill me once. You know, I know the family. So knowing that what Diana said might have validity to it I called the supervisor.... He told me to take the coveralls ... and place [them] in evidence." ER 5000-01.

One week after this 1984 interview, Deputy Eckley was interviewed by SBCSD ***627** Detective Woods, who was eager to learn what Deputy Eckley had said to Cooper's investigator. This conversation, which Deputy Eckley did not know was being recorded, strongly suggests that the SBCSD's plan was to pass off Deputy Eckley's actions as those of an ignorant deputy. Deputy Eckley told Detective Woods:

> [T]he impression that I tried to leave [Cooper's investigator] Forbush with is that I

> am so low on the Totem pol[e] that homicide could come in there and start a fire and I wouldn't even know it. Okay.[A]nd ah you know I'm just a field patrol officer took the stuff in, put it in evidence and notified my superiors. And whatever homicide and my superiors did I don't really know, I've heard you know from hearsay I understand they were contacted, but I don't know. Okay. And what I think they are going to do, is try and get me on the stand and put a shadow of doubt on homicide investigation that they did not use this lead. That's what my impression is I don't know if that's true or not.

ER 4932, 4967.

Based on the recently discovered Disposition Report, and on Deputy Schreckengost's 2005 admission his initials were on it, we now know that the prosecution committed two *Brady* violations. First, the prosecution should have turned over to Cooper's attorneys a copy of the Disposition Report. Second, the State should have preserved and made available the coveralls themselves. These two failures severely hampered Cooper's attorneys in their effort to show that Cooper was innocent, and that Lee Furrow and his companions were the true killers.

3. BLUE SHIRT AND SBCSD DAILY LOGS

On June 6, 1983, at 2:41 p.m., a woman unconnected with the investigation, Laurel Epler,

called the SBCSD and reported that she had found a blue shirt beside Peyton Road that possibly had blood on it. (Recall that the tan t-shirt was also found beside Peyton Road, which suggests that the killers may have decided to shed some of their bloody clothing at roughly the same time.) SBCSD Deputy Field was dispatched, and he recovered the shirt that day. ER 3703. The State's consistent theory of the case was that Cooper had acted alone. If Cooper could have introduced evidence of a second bloody shirt found beside Peyton Road, this would have been virtually conclusive evidence that there had been more than one killer.

Cooper's trial counsel, David Negus, maintains that he was never given, and never saw, the blue shirt or any document referring to it. At the 2004-2005 hearing in the district court, the State produced SBCSD daily logs that contained a fiveline reference to the blue shirt. The log for June 6 records the following at 14:41 (2:41 p.m.): "On Payton and Glenridge, ... Laurel Epler reports finding a blue shirt that possibly has blood on it. UNIT 21D14 HANDLING.... EVIDENCE PICKED UP." ER 3703. The State contended at the district court hearing that these daily logs were handed over to Cooper's counsel before the 1983 trial. Negus maintains that he was never given the daily logs. However, the district court refused to allow Negus to testify at the 2004-2005 hearing to rebut the State's contention that it had given the logs to him.

It is almost certain that the State did not give the daily logs to Cooper's counsel before trial. District Attorney Kottmeier testified at trial that

documents turned over to the defense are stamped with a page number "relating the number of discovery when that page was given to the defense." 1/6/85 RT 6555. The daily logs introduced into evidence at the 2004-2005 hearing have no such page numbers. At ***628** the 2004-2005 hearing, Assistant District Attorney Kochis testified that documents obtained by means of a subpoena would not go through the D.A.'s office, and therefore would not have page numbers. 8/13/04 RT 182-84. But the State has been unable to produce any record indicating that the logs were turned over to Cooper's counsel pursuant to subpoena.

Other evidence also indicates that no part of the daily logs was disclosed to Cooper before trial. Evidence that a second shirt stained with blood had been found near the place where another blood-stained shirt had been found, would have critically undermined the prosecution's theory that there was a single assailant. If Negus had had such evidence, he obviously would have used it at trial. Yet there is no mention, at any point during the trial, of a blue shirt, possibly stained with blood, that had been found beside Peyton Road shortly after the murders.

At the 2004-2005 hearing in the district court, the prosecution argued, and the district court concluded, that the blue shirt found by Laurel Epler was the same shirt as the tan t-shirt recovered by Deputy Field. There is no entry in the SBCSD daily log mentioning the tan t-shirt. The district court relied on this fact to conclude that the one daily log entry mentioning a shirt must correspond to the tan

t-shirt. There is absolutely no basis for the district court's conclusion.

The district court disregarded the procedures used by the SBCSD. The daily log, on which Epler's call was recorded, is created based on incoming telephone calls. The call intake person at the SBCSD takes a call, fills out a sheet, and hands that sheet to a dispatcher who then sends a deputy to respond to the call. After the deputy has responded, the dispatcher records the disposition of the call, and the sheet is used to complete the entry in the daily log. *Id.* at 57-59. Laurel Epler called in to report the shirt, and there is therefore an entry in the daily log recording that call. Epler testified in the 2004-2005 district court hearing that she recalled that the shirt was blue and that the location beside Peyton Road where she found the shirt was different from the location where the tan t-shirt was found on the following day. 8/26/04 RT 140-48, 154-55, 161, 165, 187, 201-03.

Deputy Field reported that on the afternoon of June 7, 1983, he participated in a search for physical evidence in the Peyton Road area. He testified that during this search, someone-possibly Sergeant Arthur-brought a tan t-shirt and an orange towel to his attention. Deputy Field took them into custody at 5:30 p.m. that day. ER 908, 2780-81. Because the tan t-shirt was discovered by a SBCSD officer during the course of a search, there was no telephone call to the SBCSD dispatcher about that shirt. There was thus no way that a reference to the tan t-shirt could appear in the daily log.

The district court denied Cooper the opportunity to develop the record to learn whether the SBCSD maintained any records of which documents it handed over to the defense prior to trial. Further, the district court denied Cooper the opportunity to conduct discovery to learn whether any other documents relating to the blue shirt, such as evidence tags and radio logs, were not disclosed prior to trial. See 8/13/04 RT 198-201.

However, even with the record in its current state, it is now clear based on the daily logs that the state has just revealed that there were two shirts, a blue shirt and a tan t-shirt. The prosecution committed a *Brady* violation in not turning over a copy of the SBCSD daily logs that recorded the discovery of the blue shirt. The prosecution committed a further *Brady* violation***629** by not making the blue shirt available to Cooper's attorneys.

4. SUMMARY

The en banc panel granted permission to file a second or successive application for habeas corpus based on a *prima facie* showing that the State violated *Brady* in not providing to Cooper Warden Midge Carroll's information about the tennis shoes issued by the prison. Now, after the 2004-2005 district court hearing, we know that there were numerous *Brady* violations. First, the State violated *Brady* by not providing Warden Carroll's information. Second, the State violated *Brady* by not providing a copy of the Disposition Report with Deputy Schreckengost's initials on it, and by not

preserving and making available Lee Furrow's bloody coveralls. Third, the State violated *Brady* by not providing a copy of the SBCSD daily logs showing Epler's call reporting that she had found a blue shirt, and by not preserving and making the shirt available.

Given the weakness of the evidence against Cooper, if the State had given Cooper's attorneys this exculpatory evidence it is highly unlikely that Cooper would have been convicted. Thus, based on the State's *Brady* violations, Cooper would be able to make a showing of actual innocence under either the standard of *Schlup* or of 28 U.S.C. § 2244(b)(2)(B)(ii).

III. RESPONSE TO THE CONCURRENCE IN THE DENIAL OF THE PETITION FOR REHEARING EN BANC

The concurrence in the denial of the petition for rehearing en banc misunderstands the bases for my dissent; makes incorrect and misleading statements about the evidence in the trial record; and mistakenly states that the evidence of Cooper's guilt at trial was "overwhelming."

A. MISUNDERSTANDING THE BASES FOR THE DISSENT

The concurrence argues that I am merely rehashing evidence and issues that have long been known to everyone ("from day one"), and that I have "improperly marshal[ed] the facts in the light most favorable to Kevin Cooper." Conc. at 636. In part, this is a legal argument, contending that Cooper has

not satisfied the standard for a second or successive habeas petition under § 28 U.S.C. § 2244(b)(2). In part, this is an argument almost invariably made in long-running criminal cases, contending that so many courts have gone over this case so many times that we can be confident that justice has been done.

On the contrary, there are two important claims, based on newly available evidence, in Cooper's current application for habeas corpus. Both claims satisfy the requirements of § 2244(b)(2). And both claims seriously undermine any confidence that justice has been done.

The first claim is that the State introduced false evidence at trial in violation of *Mooney* and *Napue*. The en banc court directed the district court to test Cooper's blood on the t-shirt for EDTA. The district court flouted that direction. If the EDTA testing had been properly performed, there would likely be important new evidence of evidence tampering by state actors. Even based on the EDTA testing that has so far been performed, there is strong evidence that Cooper's blood was planted. Further, new evidence of evidence tampering appeared during the district court hearing when it was discovered that vial VV-2, which was supposed to contain only Cooper's blood, contained blood with the DNA of two or more people. The district court refused to acknowledge the significance of this new evidence, and refused to allow any investigation into the circumstances that might have led to ***630** the blood of a second person being placed in vial VV-2.

Evidence available from the EDTA testing that has been done so far, and new evidence of evidence tampering connected with vial VV-2, substantially increases the likelihood that the State presented false evidence at trial in violation of *Mooney* and *Napue*. Evidence that would be available if further EDTA testing were performed may well increase that likelihood still further. The false evidence at trial includes Josh's two recorded statements, the State's analysis of the blood contained in A-41, the Pro Ked Dude shoeprints purportedly found in the Ryen and Lease houses, the cigarettes and tobacco purportedly found in the Ryens' station wagon, and the hatchet sheath and button purportedly found in the Bilbia bedroom in the Lease house.

The second claim is that the State failed to reveal exculpatory evidence in violation of *Brady*. Cooper's *Brady* claims based on new evidence are the failure to reveal Warden Carroll's information that the prison issued no shoes to prisoners that were available only in prisons; the failure to turn over the Disposition Report showing that Senior Deputy Schreckengost approved Deputy Eckley's discarding of Lee Furrow's bloody coveralls; and the failure to turn over daily logs showing the SBCSD took into custody a blue shirt that possibly had blood on it, and that there had been a report to the SBCSD shortly after midnight on the night of the murders of a white station wagon with wood sides, carrying three young males. The new evidence showing the second and third *Brady* violations casts new light on what had previously been known-that Deputy Eckley had discarded the bloody coveralls without testing them and without alerting Cooper's attorneys, and

that the SBCSD contended that a bloody blue shirt was never taken into custody. Based on the new evidence, we now know that the failure to make available to Cooper the bloody coveralls and blue shirt were also *Brady* violations.

If either of the above claims is valid, Cooper has a newly available claim of innocence under *Schlup* or 28 U.S.C. § 2244(b)(2)(B). Once such a claim of innocence is properly before the district court, all of the evidence in the record must be considered, including all of the evidence previously known to the parties. See *Carriger*, 132 F.3d at 478. Rather than "improperly marshal[ing] that evidence in the light most favorable to ... Cooper," I have described that evidence scrupulously and at length.

B. INCORRECT AND MISLEADING STATEMENTS

The concurrence makes incorrect and misleading statements about the evidence in the trial record. The statements include the following:

(1) The concurrence states that Cooper "admitted being [in the Lease house] within an hour of the murders." Conc. at 640. This statement is incorrect. Sunset on June 4, 1983, was at 7:59 p.m. 1/22/85 RT 6874. Cooper testified that he waited until dark to leave the Lease house, and that he left the house right after finishing a telephone call to his former girlfriend, Diane Williams. 1/7/85 RT 5828-31. Telephone records show that the call to Williams ended at 8:30 p.m. It is impossible to fix a precise time for the murders, but it is likely that they took

place quite late that night. The Ryens and their house guest, Chris Hughes, had gone to a barbeque that evening. According to a neighbor, they returned to the house sometime between 9:00 and 9:30 p.m. 10/30/84 RT 2758. Josh recounted that after the return to the house he and Chris stayed awake talking and looking at magazines, while his father ***631** stayed up watching television. 12/13/84 RT 4952-54. Josh recounted that he and Chris were wakened from their sleep.

(2) The concurrence states that "a bloodstained rope similar to the one in the Ryen's driveway" was found in the Lease house. Conc. at 640, 641. This statement is highly misleading. There were two different ropes. One was in the driveway of the Ryen house. The other was in the closet of the Bilbia bedroom in the Lease house. The parties stipulated that "one of the ropes had a center cord and the other did not." 2/5/85 RT 7694.

(3) The concurrence states that there were "signs of blood in the bathroom." Conc. at 640. This statement is highly misleading. A large horizontal band on the sides of the shower in the bathroom of the Bilbia bedroom tested positive for Luminol. For reasons explained above, the likely basis for the positive test is the bleach used by Katherine Bilbia in cleaning the shower.

(4) The concurrence states that there were "hairs consistent with the victims' hair in the drain" in the Lease house. Conc. at 640. This statement is misleading. The hairs found in the drain were examined only for shape and color. They were never

subjected to mitochondrial DNA testing. Further, we know that the Ryen children's maternal grandmother had owned the Lease house a few years before, and that the children had stayed with her in the house. Indeed, Josh specifically testified that he had taken showers in the house. 12/13/84 RT 4934-35.

(5) The concurrence states that "[t]he prosecution never suggested that Pro-Keds [sic] Dudes were only distributed to prisons." Conc. at 640. This statement is incorrect. In its opening statement to the jury, the prosecution emphasized that the shoes "were supplied strictly for prison use within the State of California and were unavailable for retail stores within California." 10/23/84 RT 2281. Michael Newberry, a Stride Rite executive, then testified at trial that Pro Ked Dudes were sold only to prisons and institutions. In its closing statement, the prosecution again emphasized that Cooper wore a "Pro Ked tennis shoe, a tennis shoe that you can't purchase in a store anywhere in this country; a tennis shoe that is manufactured only for institutions; a tennis shoe such as this which was sent to state prison in Chino[.]" 2/7/85 RT 7749. It continued, "Mike Newberry knows these aren't sold on the street." 2/7/85 RT 7752.

(6) The concurrence states that Cooper "had a prison-issued jacket with buttons like the button found on the rug in the bedroom of the Lease house where he stayed." Conc. at 640. This statement is highly misleading. The problem lies in its use of the word "like." As explained above, the button found in plain view near the closet in the Bilbia bedroom was

probably planted by the SBCSD. One of the reasons for believing that the button was planted was that it was not the same color as the buttons on Cooper's prison jacket. The button found in the bedroom was green, and would have come from a green prison-issued jacket. There was uncontradicted testimony at trial from Cooper, as well as corroborating testimony from a prison official, that Cooper had a brown or tan prison jacket.

(7) The concurrence states that "Cooper's expert agreed that the person who deposited A-41 on the wall of the hallway in the Ryen house was African-American." Conc. at 641. This statement is highly misleading. Cooper's expert, Dr. Edward Blake, testified at trial that test results obtained from blood spot A-41 indicated that blood in the spot came from someone of African-American descent. 1/30/85 RT 7405, 7409. However, when he so testified ***632** Dr. Blake was relying on tests performed on A-41 by SBCSD criminologist Daniel Gregonis. As discussed above, there is a strong likelihood that Gregonis falsified the results of those tests. During trial, Cooper's counsel forced Gregonis to admit that earlier in the trial he had repeatedly testified untruthfully about his test results for A-41. ER 746.

C. INCORRECT STATEMENT THAT EVIDENCE AT TRIAL OF COOPER'S GUILT WAS "OVERWHELMING"

The concurrence embraces the opinion of the three-judge panel denying Cooper's application for habeas corpus. Conc. at 636. The last paragraph of

that opinion states that the "evidence of Cooper's guilt was overwhelming." *Cooper*, 510 F.3d at 887. This is incorrect. In fact, the evidence of Cooper's guilt at trial was quite weak. That weakness led to a violation of Cooper's constitutional right to due process under *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). The evidence against Cooper at trial was so weak that his counsel thought there was a good chance the jury would acquit him outright. The trial judge indicated that, in his view, the evidence merited a second-degree as well as a first-degree murder instruction. He said, just before the end of trial, "Just for you to chew on, it appears to me that we're going to have to have instructions on Murder One and Two but not manslaughter." 1/24/85 RT 7135. He tried to persuade Cooper's attorneys to accept a second degree instruction, saying that omitting a second degree instruction "may well inure to you[r] detriment. They could find first degree, possibly. Otherwise they might only find second degree." 1/28/85 RT 7264.

But because the evidence against Cooper was so weak, Cooper's attorney thought it worth a gamble. In order to eliminate the possibility of a compromise verdict and to increase the chance of acquittal, Cooper's attorneys refused to accept a second degree murder instruction:

> Mr. Negus [Cooper's attorney]: Mr. Cooper and I both agreed that we don't want a second degree instruction. Correct
>
> Mr. Cooper: That's true.

> The Court: What this does, among other things, Mr. Cooper, it prevents the jurors from compromising, I suppose.
>
> Mr. Negus: That's what we don't want.... We want them to go on the testimony. It is first degree or it is nothing.

1/28/85 RT 7264. The instructions that went to the jury contained only a first degree murder instruction.

The jury deliberated for seven days before returning a guilty verdict, and deliberated for four more days before returning a death penalty verdict. Many years later, five jurors wrote to Governor Schwarzenegger asking that he grant clemency. One of those jurors wrote:

> There are so many unanswered questions that we may never know. Why did Josh not recognize Mr. Cooper? Why were there no fingerprints found where the evidence showed there should have been? Why wasn't information about the station wagon followed up on? What weren't the three Mexicans located and interviewed? Why with so much blood, was only one drop of Mr. Cooper's blood found? Why did the prosecution cover up evidence? Why was the jury not shown the photograph of Jessica Ryen clutching hair? Why wasn't the hair tested? Why wasn't the jury told about the convicted murderer's bloodied coveralls turned into the police? Why did the police destroy those

> coveralls? Why wasn't the found beer can ever ***633** tested for saliva? These are just some of the many questions I have had over the years.

App. in Suppt. of Mo. to File S. or S. Application, Vol. 7, tab 145.

In *Beck v. Alabama*, the Supreme Court held that due process requires that a lesser-included offense instruction be given in a capital case:

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting of a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. *Such a risk cannot be tolerated in a case in which the defendant's life is at stake.*

447 U.S. at 637, 100 S.Ct. 2382 (emphasis added). *Beck* requires the trial court to instruct sua sponte on a lesser-included offense in a capital case when evidence would support such a verdict. *Clabourne v. Lewis*, 64 F.3d 1373, 1379-80 (9th Cir.1995).

"Waivers of constitutional rights not only must be voluntary but must be *knowing, intelligent* acts done with sufficient awareness of the relevant circumstances and *likely consequences.*" *Brady*, 397 U.S. at 748, 90 S.Ct. 1463 (emphasis added). The

requirement of a knowing and intelligent waiver extends to *Beck* claims. *Spaziano v. Florida*, 468 U.S. 447, 457 n. 6, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Cooper waived his right under *Beck* to a lesser-included second degree murder instruction only after Negus, his counsel, misinformed him about the law and about the "likely consequences" of foregoing that instruction. At the end of the trial, the judge stated that he was "duty bound" under the law to instruct on second degree murder, despite Cooper's attorney's desire to forgo the instruction. The following opencourt colloquy then took place, during which Cooper waived his right to a second degree instruction:

> Mr. Negus (defense counsel): ... [Mr. Cooper and I] have discussed between ourselves that the only role that I could see a second degree verdict playing in this particular case is to give a jury a compromise verdict.
>
> I also informed you [*i.e.*, Cooper] that as far as the eligibility for the penalty phase in this particular case is concerned, according to the present law as it is interpreted by-at least by most of the courts, it says in the statute that *a verdict of second degree is the same as a first degree if you find two second degrees, then we're into the penalty phase.* In order not to encourage a compromise verdict, I believe that it is in your best interest to only give the jury two choices: First degree or nothing. Do you agree to do that?

Mr. Cooper: Yes.

The Court: Do you join in the waiver?

Mr. Negus: I certainly do.

The Court: All right, I accept it.

2/5/85 RT 7711-12; ER 260-261 (emphasis added). Thus, Cooper waived his second-degree murder instruction based on his counsel's statement that he was death-eligible whether the jury convicted him of first-degree or second-degree murder.

If Negus had been right about California law, it made sense to waive the second-degree murder instruction. But Negus was wrong. A conviction for second-degree murder can never support the death penalty under California law, no matter how many victims there are. On Cooper's direct appeal, the California Supreme Court acknowledged that his trial counsel's statement of California law was wrong. ***634** *Cooper*, 53 Cal.3d at 828, 281 Cal.Rptr. 90, 809 P.2d 865.

Because Cooper was misinformed by his attorney about the consequences of foregoing the second-degree murder instruction, his waiver of his due process right under *Beck* was clearly invalid. Cooper specifically cited *Beck* in his first federal application for habeas corpus. However, the district court failed to mention Cooper's *Beck* claim in denying his first application. On appeal, the three-judge panel of this court rejected his *Beck* claim by a vote of two to one. *Cooper*, 255 F.3d

at 1110-11, 1114-15. One of the two judges held that Cooper had failed properly to raise the claim in his application, even though he had specifically cited *Beck*. The other held that he had properly raised the claim, and that his due process rights under *Beck* had been violated, but that the error was harmless. The third judge voted to grant the writ. He would have held that Cooper properly raised his *Beck* claim, that his due process rights under *Beck* had been violated, and that the error was not harmless. An en banc call of the panel's decision failed.

We cannot now go back to revisit our earlier decision on Cooper's due process claim under *Beck*, for it was raised and rejected in his earlier federal habeas application. 28 U.S.C. § 2244(b)(1). But the background of his Beck claim, and the fate of that claim, make two things clear. First, contrary to what the concurrence says, the evidence against Cooper at trial was not "overwhelming." On the contrary, it was so weak that it led Cooper's counsel to gamble on getting an outright acquittal. Second, contrary to what the concurrence suggests, there is no way to be confident that justice has been done in this case.

IV. CONCLUSION

Doug, Peggy and Jessica Ryen, and Chris Hughes, were horribly killed. Josh Ryen, the surviving victim, has been traumatized for life. The other members of the Ryen family, and the surviving members of the Hughes family, have also been traumatized for life. The criminal justice system has made their nightmare even worse.

San Bernardino County Sheriff's Department investigators were confronted with a horrifying multiple murder, far worse than any that had previously occurred in the county. They had an obvious suspect, an escaped prisoner who had stayed for two days at a house 125 yards away from the murder victims. They were under heavy pressure from the news media from the very first moment of their investigation. They drew what seemed, at the beginning, a sensible conclusion-that Kevin Cooper, the escaped prisoner, was the murderer. They drew that conclusion by the end of the first day of their investigation, and from that time forward they organized their investigation around it.

Once SBCSD investigators drew that conclusion, they manipulated and planted evidence in order to convict Cooper. In the course of their investigation, they discounted, disregarded, and discarded evidence pointing to other killers. Their decision to close their eyes early in the investigation to the possibility that someone other than Kevin Cooper might be guilty has led us to the situation in which we find ourselves today.

Unfortunately, the district court made things worse. After our en banc panel granted Cooper permission to file a second habeas application, the district court obstructed and impeded Cooper and his lawyers in almost every way imaginable.

Kevin Cooper has now been on death row for nearly half his life. In my opinion, he is probably innocent of the crimes for which the State of California is about to *635 execute him. If he is

innocent, the real killers have escaped. They may kill again. They may already have done so.

We owe it to the victims of this horrible crime, to Kevin Cooper, and to ourselves to get this one right. We should have taken this case en banc and ordered the district judge to give Cooper the fair hearing he has never had.

WARDLAW, CIRCUIT JUDGE, DISSENTING FROM THE DENIAL OF REHEARING EN BANC, JOINED BY PREGERSON, REINHARDT, THOMAS, AND BERZON, CIRCUIT JUDGES:

Public confidence in the proper administration of the death penalty depends on the integrity of the process followed by the state. *See Furman v. Georgia*, 408 U.S. 238, 299, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring) ("[I]t is our society that insists upon due process of law to the end that no person will be unjustly put to death, thus ensuring that many more of those sentences will not be carried out."). So far as due process is concerned, twenty-four years of flawed proceedings are as good as no proceedings at all.

We authorized Kevin Cooper to file his second or successive habeas petition so that the district court could resolve the problem so ably articulated by Judge Silverman: "Cooper is either guilty as sin or he was framed by the police. There is no middle ground." *Cooper v. Woodford*, 358 F.3d 1117, 1124 (9th Cir.2004) (en banc) (Silverman, J., concurring in part and dissenting in part). Instead, through a series of errors accurately described by Judge

Fletcher in his dissent, the district court precluded Cooper from having his last day in court. As Judge Fletcher states, the district court "imposed unreasonable conditions on the testing the en banc court directed; refused discovery that should have been available as a matter of course; limited testimony that should not have been limited; and found facts unreasonably, based on a truncated and distorted record." Fletcher Dissent at 583.

Because of the district court's erroneous rulings and failure to follow the express direction of our en banc court, regrettably, we still do not know the answer to Judge Silverman's query. *See also Cooper v. Brown*, 510 F.3d 870, 1004 (9th Cir.2007) (McKeown, J., concurring) ("I ... am troubled that we cannot, in Kevin Cooper's words, resolve the question of his guilt 'once and for all.'"). Granting rehearing en banc and remanding for a full and fair evidentiary hearing may not have resolved the question of guilt or innocence, but it most certainly would have given us confidence that Cooper received his due opportunity to prove the innocence he has insisted upon since his arrest. I therefore respectfully dissent from the denial of rehearing en banc.

FISHER, CIRCUIT JUDGE, DISSENTING FROM DENIAL OF REHEARING EN BANC, JOINED BY KOZINSKI, CHIEF JUDGE, PREGERSON, GRABER AND BERZON, CIRCUIT JUDGES:

I generally agree with Judge Fletcher that we should have taken this case en banc to require the

factual inquiry the previous en banc court expected to occur.

REINHARDT, CIRCUIT JUDGE, DISSENTING FROM THE DENIAL OF REHEARING EN BANC:

I concur in Judge Fletcher's thorough and highly persuasive dissent, as well as in Judge Wardlaw's pithy summary of the judicial failures that infect this case. I would add, however, that the failures are not solely those of the district court. Our own handling of the matter, some of which has been made public and some of which has not, leaves much to be desired, and is a cause of considerable regret. There is ***636** no purpose, however, to looking backward at this point. What matters is that we have an obligation to afford Kevin Cooper a full and fair judicial hearing, and that once again we fail. By denying en banc review, we add to the prior systemic judicial malfunctions, and this time, we do so under a cloak of secrecy.

I have on numerous occasions urged that we disclose the names of judges who vote for and against rehearing cases en banc. *Spears v. Stewart*, 283 F.3d 992, 997 (9th Cir.2002) (Reinhardt, J., dissenting from denial of en banc review); *In re Silicon Graphics Inc. Securities Litigation*, 195 F.3d 521, 523-24 (9th Cir.1999) (Reinhardt, J., dissenting from denial of en banc review); *United States v. Koon*, 45 F.3d 1303, 1308-10 (9th Cir.1995) (Reinhardt, J., dissenting from denial of en banc review); *Brewer v. Lewis*, 997 F.2d 550, 556 (9th Cir.1993) (Reinhardt, J., dissenting from denial of en banc review); *Elder v. Holloway*, 984 F.2d 991,

1001 (9th Cir.1993) (Reinhardt, J., dissenting from denial of en banc review); *Harris v. Vasquez*, 949 F.2d 1497, 1539-40 (9th Cir.1990) (Reinhardt, J., dissenting from denial of en banc review). Here, once again, the vote is extremely close, closer than the list of dissenters would suggest. I believe that as judges we have an obligation to let the public know how we vote on critical issues. The public, the legal academy, our colleagues on other courts, and appointing authorities have a right to judge us based on our performance on the bench. In this case, in particular, I believe that public disclosure is important. Revealing how we voted would provide information that would be of interest to those who follow the course of our circuit law and who have drawn certain assumptions about the jurisprudence of various judges that sometimes are unwarranted. Most important, this is a case in which a man's life is at stake. Kevin Cooper may or may not be guilty, but serious flaws in our legal system have been exposed. Whether to go en banc or not is a matter of judicial discretion. An en banc review by our court would surely do no harm. Nor would revealing the names of those who agree and disagree with affording this capital defendant a final protection before sending him on his way to execution by the state.

RYMER, CIRCUIT JUDGE, CONCURRING:

I concur in the court's order declining to rehear this case en banc. The panel opinion explains why we affirmed denial of the writ, *Cooper v. Brown*, 510 F.3d 870 (9th Cir.2007) (*Cooper IV*), so I write now only to highlight the main reasons I agree with

the court's decision and not the dissents from failure to take the case en banc. I take particular issue with Judge Fletcher's dissent because:

1. The dissent improperly marshals the facts in the light most favorable to Kevin Cooper, yet the evidence was resolved against Cooper at trial-after he took the stand and testified-and at each step of post-conviction proceedings. The dissent also approaches the issues as if they were new, yet the same issues have been on the table since day one (except for DNA testing which didn't exist at the time and which has turned out to be inculpatory). This includes Josh Ryen's statements; handling the drop of blood A-41; the presence of three strangers at the Canyon Corral Bar; that three white men were seen driving on the road leading away from the Ryen house; Cooper's tennis shoes and whether they were Pro-Keds Dudes or left the impressions made at the Lease house as well as at and near the Ryen house; the bloody coveralls that were linked to Lee Furrow and were destroyed by law enforcement; where in the Lease house the hatchet sheath was found; whose blood was on a tan T-shirt found ***637** along the road; cigarette butts in the Ryen station wagon that were linked to Cooper; if there were a blue shirt and what happened to it; and police incompetence, mishandling of evidence, and chain of custody problems. All were known at the time of trial and have been litigated in one forum or another, unfavorably to Cooper, for the last 24 years.

2. The dissent ignores the rules that Congress established for federal habeas review of state criminal judgments in the Antiterrorism and

Effective Death Penalty Act of 1996 (AEDPA). Cooper's petition is a successive federal habeas corpus application that was preceded by appeals through the California courts, post-conviction petitions in state and federal court, and evidentiary hearings in both state and federal court.[1] At this

---

[1] Cooper's February 19, 1985 judgment of conviction, and sentence to death on May 15, 1985, was affirmed by the California Supreme Court. *People v. Cooper*, 53 Cal.3d 771, 837, 281 Cal.Rptr. 90, 129 (1991). The United States Supreme Court denied a petition for certiorari, *Cooper v. California*, 502 U.S. 1016, 112 S.Ct. 664, 116 L.Ed.2d 755 (1991). Cooper's first federal application, subsequently amended and supplemented, was filed August 11, 1994, and denied August 25, 1997 following an evidentiary hearing. 92-CV-427, Doc. No. 165. We affirmed, *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir.2001) (*Cooper I*); denied Cooper's PFR/PRFEB; and his petition for a writ of certiorari was denied, 537 U.S. 861, 123 S.Ct. 238, 154 L.Ed.2d 100 (2002). Cooper filed a second federal application on April 20, 1998 raising a claim related to the Koon statement, which we construed as an application for authorization to file a second or successive petition, and denied. *Cooper v. Calderon*, 274 F.3d 1270 (9th Cir.2001) (*Cooper II*). Cooper sought to file another successor application that involved DNA testing and tampering, which we denied, *Cooper v. Calderon*, No. 99-71430 (9th Cir. Feb. 14, 2003, April 7, 2003) (orders noting that DNA tests to which the state and Cooper agreed do not exculpate him, nor were there newly discovered facts establishing his innocence, and denying PFR based on asserted deficiencies in the testing and tampering). Meanwhile, Cooper filed seven petitions in the California Supreme Court together with a writ of mandate and various motions, a habeas petition in the San Diego County Superior Court, and six other petitions for a writ of certiorari in the United States Supreme Court as well as two petitions for habeas corpus, each of which was denied. On October 22, 2002 Cooper filed a motion for mitochondrial DNA testing of hairs, and on June 16, 2003 for testing of the tan T-shirt, to show tampering. These were denied following an evidentiary

stage, AEDPA requires federal courts to presume that factual determinations by state courts are correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1).[2] This applies to determinations*638 adverse to Cooper on police tampering with A-41 and cigarette butts, the presence of three men at the Canyon Corral, and

---

hearing in the state court that found no tampering. An-other petition in the California Supreme Court raised essentially the same claims as asserted in this application: actual innocence, tampering with evidence, failure to disclose exculpatory evidence, offering unreliable eye witness testimony of Josh Ryen, and denying Cooper effective assistance of counsel during post-conviction DNA proceedings; the supreme court denied all claims on the merits on February 5, 2004, and also denied as untimely those having to do with evidence tampering, failure to disclose exculpatory evidence, submission of false testimony to the jury, and offering Joshua Ryen's unreliable testimony. On February 6, 2004, Cooper filed another application to file a successive application, which was initially denied, *Cooper v. Woodford*, 357 F.3d 1019 (9th Cir.2004), *withdrawn*, 357 F.3d 1054 (Editor's Note Feb. 8, 2004), but was later granted when this court reheard the application en banc, *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir.2004) (*Cooper III*). As authorized by *Cooper III*, Cooper filed his third application in the district court April 2, 2004. The district court held an evidentiary hearing at which 42 wit-nesses testified, and denied the writ. See *Cooper IV*, Appendix A. It is this ruling that is the subject of this appeal.

[2] All references are to Title 28 of the U.S. Code Section 2254(e)(1) provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

tampering with the tan T-shirt. AEDPA also precludes federal courts from granting habeas relief when a state court has adjudicated the merits of a claim raised in a federal petition and the state court's adjudication is neither contrary to, nor an unreasonable application of, federal law as determined by the United States Supreme Court. § 2254(d).[3] This applies to state court determinations on Cooper's claim of actual innocence, evidence tampering, Josh Ryen's statements, destruction of the bloody coveralls, the blue shirt, and failure to disclose exculpatory evidence.

AEDPA further provides that federal courts must dismiss claims that the petitioner has presented in a prior application. § 2244(b)(1).[4] This includes handling of A-41; the Koon statement; destruction of

---

[3] Section 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[4] Section 2244(b)(1) provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

the bloody coveralls; and planting evidence or manipulating tests, on cigarette butts. AEDPA likewise requires dismissal of claims for which the factual predicate could have been discovered before and that, if proved and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense. § 2244(b)(2)(B)(i)-(ii).[5] This includes the blue shirt and daily log; cigarette butts and their testing; Josh Ryen's statements; the three men at the Canyon Corral; Lee Furrow and the bloody coveralls; destruction of the coveralls; and the hatchet sheath.[6]

---

[5] Section 2244(b)(2) provides:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

[6] Even if *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), rather than AEDPA, applies to actual

***639** As the dissent pays no attention, and gives no deference, to state court determinations, and reaches the merits of claims without regard to whether AEDPA mandates their dismissal, the picture it paints is quite different from the canvas that is actually before us.

3. In lieu of AEDPA, the dissent starts with the false premise that the district court "flouted" this court's "direction" (in our en banc opinion authorizing Cooper to file his successive habeas application) to perform EDTA and mitochondrial DNA testing.[7] The district court did no such thing; it

---

innocence for purposes of gateway claims, the question would be whether, in light of all the evidence, including reliable new evidence, it is more likely than not that no reasonable juror would have found Cooper guilty beyond a reasonable doubt. Following an evidentiary hearing the district court found that, to the extent there was new evidence, it was incredible, unreliable or unpersuasive with respect to all claims in the petition, that neither EDTA nor mitochondrial DNA tests showed innocence or undermined evidence of Cooper's guilt, and that the showing of actual innocence was insufficient to avoid procedural bars. The evidence supports these findings, therefore Cooper cannot pass through to other claims by means of either § 2244(b)(2)(B)(i)-(ii), or *Schlup*.

[7] *Cooper III*, 358 F.3d at 1124. Having noted Cooper's position that the question of his innocence could be answered "once and for all" by mitochondrial testing of blond hairs in Jessica Ryen's hands and testing for the presence of the preservative agent EDTA on the tan t-shirt, *Cooper III* also observed: "The district court may be in a position to resolve this case very quickly. As soon as Cooper's application is filed, it should promptly order that these two tests be performed in order to evaluate Cooper's claim of innocence." *Id.*

> Given the posture of the case as it was before the en banc panel, however, I disagree with the dissent's

did precisely what *Cooper III* suggested that it do. Between April 2, 2004 (when Cooper filed his application pursuant to our authorization) and April 1, 2005, the district court held a tutorial on testing for the presence of ETTA requested submissions on a variety of testing-related issues which the parties provided after consulting with their experts, participated in numerous hearings and conferences over a three-month period to develop a protocol, ordered the two tests to be conducted, resolved problems that came up during the process, analyzed the results, and issued a thoughtful 159-page ruling that discusses in meticulous detail all aspects of the testing as well as each claim in Cooper's petition.

4. The district court did the job it was required to do under *Daubert v. Merrell Dow Pharmaceuticals,*

---

implicit assumption that this court *could* have "directed" the district court to conduct the two tests. The only issue before the en banc panel was whether Cooper should be allowed to file a successive application for habeas corpus under AEDPA. 28 U.S.C. § 2244(b)(3)(A); *Cooper III*, 358 F.3d at 1123 ("We hold only that Cooper has made out a prima facie case that entitles him to file a second or successive application."). Once this court authorized the application to be filed, it was up to the *district court* to decide in the first instance whether any of the claims-including those involving EDTA and mitochondrial DNA testing-could go forward, and how to deal with them. See 28 U.S.C. § 2244(b)(4). Its decision is, of course, subject to appeal and those issues are now properly before us. But our review is guided by AEDPA, not by a mistaken assumption about the scope of our prior mandate.

Inc., 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)-determine whether EDTA testing is scientifically valid. The district court concluded that the analysis by Cooper's expert did not pass muster. There is no evidence that the methodology Cooper's expert espoused has been, or can be, tested. No other scientists regularly perform this kind of testing. There are no industry standards regarding proper testing protocol, and we have no idea how the history of each specimen's exposure to environmental EDTA will affect the sample and, in turn, the testing. There is no "normal" base level of EDTA. EDTA testing has only been offered to courts on two occasions, and in the one proceeding in which it was ***640** challenged, Cooper's expert was involved and both his qualification, and his EDTA testing, were rejected as biased and flawed. Thus, the district court appropriately exercised its gate-keeping discretion to exclude EDTA testing as unreliable. The effect is to leave the state superior court's factual finding (following an evidentiary hearing)-that there was no tampering or contamination by law enforcement officers-un-refuted.

The Supreme Court has made it abundantly clear that this court may not set aside a district court's factual findings unless those findings are clearly erroneous. *Knowles v. Mirzayance*, --- U.S. ----, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251 (2009); Fed.R.Civ.P. 52(a). The dissent, however, assesses the EDTA evidence from scratch (including evidence that was withdrawn), and substitutes its own findings for those of the district judge-based on charts and graphs and regression analyses that *it*

has crafted. No court, let alone this court on appellate review, may consider evidence that an expert does not stand behind, nor may we reject a district court's findings of fact-informed by the record before that court-by manipulating data in a way that appears better and brighter to us.

In short, there is no reliable evidence of tampering.

5. In asserting that "[t]he State of California may be about to execute an innocent man," the dissent neglects to acknowledge the evidence tying Cooper to the murders, or the fact that, after all the testing that has been done post-conviction, no forensic evidence suggests that anyone else was at the scene of the crime or was the killer.

Cooper testified at trial. He told an implausible story about what he did at the Lease house and how he left for Mexico. The jury disbelieved him. The defense theory (then as now) was that there were multiple assailants and police incompetence. Josh Ryen's ambivalent recollections, the presence of three Caucasian men at the Canyon Corral Bar, that three Hispanics were at the ranch before the murders, that three white men were seen driving down the road from the Ryen house, how the blood spot A-41 was handled (or mishandled), the bloody coveralls that were destroyed, the possible involvement of Koon or Lee Furrow, the possibility of an Aryan Brotherhood hit gone awry, the tan T-shirt, and a blue shirt that was logged in but not located, were all known at the time of trial. The jury rejected evidence pointing to other killers.

No one else has ever been connected to the Lease house-where Cooper admitted being within an hour of the murders-and where, after the murders, were found a bloodstained rope similar to one in the Ryens' driveway, signs of blood in the bathroom, and hairs consistent with the victims' hair in the drain.

Cooper admitted at trial that he had prison-issued tennis shoes and never said they weren't Pro-Keds Dude, the shoe with a distinctive pattern that was consistent with impressions in both the Lease house and the Ryen house. The prosecution never suggested that Pro-Keds Dudes were only distributed to prisons, which makes both the warden's recollections and inmate Taylor's immaterial; the prosecution's theory was that there was a link between the imprints found at and near the Ryen house and in the Lease house to Cooper, who admitted staying there, did not deny wearing prison-issue shoes, and whose shoe-size fit the prints.

Cooper had a prison-issued jacket with buttons like the button found on the rug in the bedroom of the Lease house where he stayed. Prison-issue tobacco for cigarettes, which Cooper smoked, was found in *641 the Lease house and in the Ryen station wagon, where a hand-rolled butt (and a manufactured butt) consistent with his saliva were found. Hairs and hair fragments in the car were likewise consistent with Cooper's.

Cooper tossed incriminating evidence-including his prison-issued tennis shoes and other prison clothing-over-board into the ocean from the boat on

which he got a job in Ensenada after leaving the Lease house. The jury could, and we must presume that it did, infer consciousness of guilt from this conduct. No "other killer" toward whom the dissent says that "evidence points" is African-American. Cooper's expert agreed that the person who deposited A-41 on the wall of the hallway in the Ryen house was African-American. Postconviction DNA testing, requested by Cooper, inculpates him.

No test on any item has ever pointed to any one else as the killer. This includes, in addition to A-41, tests of blood on the hatchet taken from the Lease house that matched Doug and Jessica Ryen and Chris Hughes; a bloodstained rope found in the Lease bedroom closet that was similar to a bloodstained rope found on the Ryens' driveway; cigarette butts found in the Ryen station wagon and headboard of the bed on which Cooper slept one night in the Lease house; hairs recovered from the Ryen's station wagon; fingerprints in the Lease house; hairs in the sink and shower at the Lease house that were consistent with Jessica's and Doug Ryen's; and the tan T-shirt.

The state courts found no evidence of tampering with respect to the shoe prints, cigarette butts, A-41, or DNA testing. Neither EDTA testing, mitochondrial DNA testing, nor anything else presented at the evidentiary hearing in district court, clearly and convincingly shows otherwise.

For sure, no investigation or trial is perfect. Judge McKeown makes this point in her panel concurrence, *Cooper IV*, 510 F.3d at 1007, yet

recognizes that the law demands affirmance. I agree with the full court's decision that this is so.

143

No. 09-363

Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN COOPER, *Petitioner,*

v.

ROBERT K. WONG, ACTING WARDEN, SAN QUENTIN STATE PRISON, SAN QUENTIN, CALIFORNIA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California

DONALD E. DENICOLA
Deputy State Solicitor General

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

RONALD S. MATTHIAS
Senior Assistant Attorney General

HOLLY D. WILKENS
Supervising Deputy Attorney General
Counsel of Record

110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2197
Fax: (619) 645-2191

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

1. Does the execution of a condemned inmate violate the Eighth Amendment when the inmate's guilt has been confirmed by post-conviction DNA test results, and his actual-innocence claim is refuted by the factual findings of every state and federal court to consider it?

2. When considering an actual-innocence claim, is a district court required to ignore established standards for conducting post-conviction discovery and an evidentiary hearing in order to ensure that the hearing it provides is "full and fair"?

3. Must a federal habeas court determine whether 28 U.S.C. § 2244 supercedes the gateway standard for successive petitions articulated in *Schlup v. Delo*, 513 U.S. 298, 316 (1995), or whether there is an exception to both standards for claims alleging a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), when the Petitioner cannot satisfy either the *Schlup* standard or § 2244(b) and the court reaches all of Petitioner's claims, including the *Brady* claims, on the merits?

TABLE OF CONTENTS

Page

STATEMENT 1
ARGUMENT 15
CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Brady v. Maryland
373 U.S. 83 (1963) 12, 16, 32

Calderon v. Thompson
523 U.S. 538 (1998) 23

Cooper v. Calderon
255 F.3d 1104 (9th Cir. 2001), *cert. denied*, 537 U.S. 861 (2002) 6

Cooper v. Calderon
274 F.3d 1270 (9th Cir. 2001) 7

Cooper v. Calderon
538 U.S. 984 (2003) 7, 9

Cooper v. California
528 U.S. 897 (1999) 7

Cooper v. California
540 U.S. 1172 (2004) 10, 11

Cooper v. Woodford
358 F.3d 1117 (9th Cir. 2004) 11, 12

Daubert v. Merrell Dow Pharmaceuticals, Inc.
509 U.S. 579 (1993) 13, 14

District Attorney for Third Judicial District v. Osbourne
___ U.S. ___, 129 S. Ct. 2308 (2009) 19, 30

Evans v. Smith
220 F.3d 306 (4th Cir. 2000) 32

Goldblum v. Klem
510 F.3d 204 (3rd Cir. 2007) 31

TABLE OF AUTHORITIES
(continued)

Page

Herrera v. Collins
506 U.S. 390 (1993) 16, 17, 18

House v. Bell
547 U.S. 518 (2006) ..... 16, *et passim*

In re Clark
5 Cal. 4th 750 (1993) 17

In re Cooper
538 U.S. 976 (2003) 9

In re Cooper
540 U.S. 808 (2003) 9

In re Davis
No. 08-1443, 2009 WL 2486475 (U.S., Aug. 17, 2009) .....
..... 16, 17, 18

Jordan v. Secretary of Dept. of Corrections
485 F.3d 1351 (11th Cir. 2007) 31

Knowles v. Mirzayance
___ U.S. ___, 129 S. Ct. 1411 (2009) 29

Lott v. Bagley
569 F.3d 547 (6th Cir. 2008) 32

Medina v. California
505 U.S. 437 (1992) 30

People v. Cooper
53 Cal. 3d 771, 809 P.2d 865, 281 Cal. Rptr. 90, *cert. denied*, 502 U.S. 1016 (1991) 6, 21, 27

Schlup v. Delo
513 U.S. 298 (1995) ..... 16, *et passim*

TABLE OF AUTHORITIES
(continued)

Page

Tompkins v. Secretary, Department of Corrections
557 F.3d 1257 (11th Cir. 2009) 32

STATUTES

28 U.S.C. § 2244 23

28 U.S.C. § 2244(b) ..... 16, *et passim*

Antiterrorism and Effective Death Penalty Act of 1996
("AEDPA") 23, 31

CONSTITUTIONAL PROVISIONS

United States Constitution
VIII Amendment 15

STATEMENT

Petitioner escaped from custody in Pennsylvania while awaiting trial on a number of criminal charges. While an escapee in October 1982, he kidnapped, raped, and then stole the car of a high school student who had interrupted him while he was burglarizing a home. Petitioner then fled to California and assumed the alias "David Trautman." Under that name, he was arrested, convicted, and sentenced to prison for a residential burglary in Los Angeles County. On April 29, 1983, Petitioner was sent to the California Institute for Men (CIM), a prison in Chino, California, for routine processing after sentencing. Because Petitioner's true identity (and criminal history) had not been discovered by CIM officials, Petitioner was transferred to a minimum-security portion of the prison on June 1, 1983. (I App. 53, 55, 79, 82.)

On the following afternoon, June 2, 1983, Petitioner escaped again — the twelfth time he had done so in his criminal career. Petitioner took refuge in a nearby lumber yard and, then, after nightfall, he made his way to a vacant house (the "hideout house") in a rural area of Chino. The hideout house was on a property adjacent to the ranch where Franklyn (Doug) Ryen and Peggy Ryen lived with their two children, 10-year-old Jessica and 8-year-old Joshua. The Ryen home was located 126 yards from the hideout house. On the night of June 4, 1983, the Ryens were away from their home attending a neighborhood barbecue. The Ryens — accompanied

by 11-year-old Christopher Hughes, whose parents had allowed him to spend the night at the Ryens' — returned home around 9:00 or 9:30 that night. (I App. 53-57, 64, 79.)

At some point before midnight, Petitioner entered the Ryens' home and brutally attacked the occupants with a hatchet, knife, and an ice-pick-like weapon. Doug sustained 37 wounds and a fractured skull. Peggy suffered 32 wounds, mostly to her head, neck, chest, stomach, and breasts. Jessica received 46 wounds, among them a deep V-shaped injury to her forehead and more than 20 carving injuries to her chest. Joshua suffered a hatchet wound to the top of his head, another near his left ear, and a stab wound to his throat. Christopher Hughes sustained 25 wounds to his head, chest, back, and arms — and one wound nearly severed his right hand. The bodies were found by Christopher's father around 11:30 a.m. the next morning on Sunday, June 5, 1983. Jessica was found lying in a hallway leading into the master bedroom. The others were inside the master bedroom. All were dead except for Joshua. (I App. 53, 59-65.)

Petitioner fled in the Ryen station wagon, which authorities found abandoned in Long Beach. On the floorboard of the vehicle was a unique brand of loose tobacco not available retail but provided free to CIM inmates. There were also two cigarette butts in the car. One was manufactured and the other was hand-rolled and contained the same unique tobacco. Saliva analysis of the two cigarette butts showed they were smoked by a "non-secretor." The ABO blood type of

the person who smoked the manufactured cigarette butt was determined to be type A. Petitioner's blood type is A. He is also a non-secretor, as is 20 percent of the population. A stain on the door-jam of the Ryen vehicle was human blood, type AB, consistent with Peggy and Jessica Ryen. A hair fragment found inside the vehicle was consistent with Petitioner's pubic hair. (I App. 74-76.)

Petitioner was charged with escape from a state prison, four counts of first degree murder, and one count of attempt to commit first degree murder. He admitted at trial that he had taken refuge in the hideout house. He could hardly deny it: his presence in the hideout house was established by the discovery of his fingerprint, footprint, and semen inside the home. The unique CIM-issued tobacco that Petitioner admitted possessing at the time of his escape from CIM was also found inside the hideout house. Petitioner, further, was found in possession of numerous items taken from the hideout house when he was subsequently arrested on July 30, 1983, in Santa Barbara County after attempting to rape a woman. Phone records and statements by Petitioner's former girlfriends placed him inside the hideout house trying to enlist help to get out of the area. At 8:27 p.m. the night of the murders, Petitioner hung up the phone after learning that none of his girlfriends would assist him. (I App. 67-69, 74, 78-80, 228-229.)

Other evidence tied Petitioner to both the hideout house and the Ryen home. A shoe print made by the same brand and model of shoe that

Petitioner admitted wearing at the time of his escape, in the same size as Petitioner's, was inside the hideout house. A shoe print from the same size, brand, and model shoe was on the spa cover outside the sliding glass door of the Ryen master bedroom, and a partial print in blood made by the same size, brand, and model shoe was on the bed sheet from the floor of the Ryen master bedroom.[1] The hatchet used in the murders at the Ryen home had been taken from the hideout house, where its sheath was left behind. Also missing from the hideout house were an eleven-inch hunting knife, buck knives, and ice picks capable of inflicting the injuries observed on the victims. Plant burrs found on the blanket Petitioner used at the hideout house were consistent with vegetation growing between the hideout house and the Ryen home, and with similar burrs found underneath Jessica's nightgown and in the Ryen station wagon. Also found in a plowed horse-training arena about midway between the two homes was a nearly empty can of beer. It was the same brand of beer as a six pack of beer in the Ryen refrigerator that had one can missing and another can hanging over the edge of a shelf with bloodstains on it. (I App. 56-59, 62, 71-72, 76-77, 80.)

Inside the Ryen home, there was a drop of blood on the wall of the hallway opposite the door to the master bedroom. The drop of blood was

---

[1] Petitioner's prison-issued shoes were never recovered. He testified at trial that he threw them and other prison-issued clothing into the ocean once he sailed into domestic waters after returning from Mexico. (I App. 80.)

tested and found to belong to an African-American male consistent with Petitioner's genetic profile. Dr. Blake, Petitioner's own expert, performed tests on the blood drop that he believed had the best chance of excluding Petitioner if he was not the donor. Tests could not exclude Petitioner as the donor, and additional testing included Petitioner among the possible donors. (I App. 72-73.)

Additional evidence showed that Petitioner returned to the hideout house to clean up after committing the murders at the Ryen home. Luminol testing of the shower stall and bathroom sink in the hideout house was positive, a result consistent with the presence of otherwise invisible blood residue. Positive luminol readings in the shape of foot impressions were also obtained on a carpet and in a closet. Hairs recovered from the drain trap in the bathroom sink were consistent with Jessica's, and a hair recovered from the shower drain was consistent with Doug's. A bloodstained rope was found in a closet and the blood was consistent with being a mixture of blood from either Jessica and Doug Ryen, or from Peggy and Doug Ryen. A blood-stained green khaki button on the floor of the hideout house was identical to those affixed to the prison-issued jacket Petitioner admitted he was wearing when he escaped from CIM. (I App. 69-71, 73-74.)

Despite the foregoing evidence tying Petitioner to the hideout house, to the Ryen house, and to the Ryen vehicle, Petitioner denied that he ever entered the Ryen house or station wagon. He claimed that he simply walked from the hideout house on the night of

the murders, occasionally stopping drivers for directions to Mexico. (I App. 79.)

Petitioner pled guilty to escape from a state prison and a jury found petitioner guilty of the remaining charges and sentenced him to death. The California Supreme Court affirmed the judgment, observing that the "sheer volume and consistency of the evidence is overwhelming." (I App. 44, 53; *People v. Cooper*, 53 Cal. 3d 771, 837, 809 P.2d 865, 281 Cal. Rptr. 90, *cert. denied*, 502 U.S. 1016 (1991).) On March 26, 1992, the first in a series of stays of execution was issued by the district court. More than 17 years of post-conviction challenges have followed. (I App. 44.)

The district court denied Petitioner's first habeas petition in 1997 after permitting it to be amended and supplemented, and after conducting an evidentiary hearing. (I App. 44-45; II App. 436, n.1.) The denial of Petitioner's first habeas petition was affirmed by the Court of Appeals for the Ninth Circuit, and rehearing and rehearing *en banc* was denied. (I. App. 47; II App. 436, n.1; *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001), *cert. denied*, 537 U.S. 861 (2002).)

Petitioner filed a second petition for writ of habeas corpus in the district court on April 30, 1998. On June 15, 1998, the district court dismissed the petition for lack of jurisdiction and as an impermissible successive petition. (I App. 46.) Petitioner's second habeas petition was construed by the Ninth Circuit as an application to file a successive petition, and denied on December 21,

2001. (I App. 47; *Cooper v. Calderon*, 274 F.3d 1270 (9th Cir. 2001).) His petition for rehearing and rehearing *en banc* from the denial of his application was denied on October 18, 2002. This Court denied certiorari.[2] (I App. 47; *Cooper v. Calderon*, 538 U.S. 984 (2003)).

Petitioner's 1984-1985 trial having been conducted prior to the advent of DNA testing, the State in 2001 agreed to Petitioner's request for DNA testing in his effort to prove his alleged innocence. Petitioner, with the assistance of his post-affirmance counsel and two nationally- recognized DNA experts, entered into a joint agreement with the State to test evidence in the case. Petitioner's expert, Dr. Blake, identified the drop of blood from inside the Ryen home (Item A-41) and the two cigarette butts recovered from the stolen Ryen station wagon as "the most relevant biological evidence" in the case. The result from the agreed-upon post-conviction DNA testing further inculpated Petitioner, and confirmed the already overwhelming evidence of his guilt presented at his trial. The DNA testing confirmed the serology analysis from trial that placed Petitioner in the middle of the crime scene inside the Ryen home. The drop of blood (A-41) matched Petitioner's DNA profile, and the probability of a random match within the general population is 1 in 310 billion for African Americans, 1 in 270 billion for Caucasians,

---

[2] In the interim, Petitioner had filed a third petition for writ of certiorari with this Court challenging the denial of his third state habeas petition by the California Supreme Court. (I App. 47; *Cooper v. California*, 528 U.S. 897 (1999).)

and 1 in 340 billion for Western Hispanics. The DNA results on the cigarette butts confirmed Petitioner's presence in the Ryen station wagon to facilitate his escape from the area. The two cigarette butts found in the stolen Ryen station wagon contained DNA that matched Petitioner's profile, and the probability of a random match within the general population is 1 in 19 billion for African Americans, 1 in 11 billion for for Caucasians, and 1 in 15 billion for Western Hispanics for the manufactured cigarette butt, and 1 in 110 million for African-Americans, 1 in 16 million for Caucasians, and 1 in 12 million for Western Hispanics for the hand-rolled CIM-issued tobacco cigarette butt. (I App. 83-85, 121.)

Additionally, tests were conducted on the hatchet from the hideout house and T-shirt found two miles from the crime scene. The DNA test results from the hatchet confirmed that the blood was consistent with that of Petitioner's victims. The T-shirt — which was never used against Petitioner at trial — bore DNA consistent with that of both Petitioner and his victims. (I App. 85.)

Petitioner filed a second application in the Ninth Circuit for leave to file a successive habeas petition involving DNA testing and allegations of evidence tampering. The court denied the application in 2003, after finding that the DNA tests to which the State and Petitioner agreed do not exculpate Petitioner, that there were no newly-discovered facts establishing innocence, and that no prima facie case had been stated for relief based on asserted deficiencies in the DNA testing or

tampering allegations. (I. App. 48; II App. 436, n.1.) Petitioner's fifth petition for writ of certiorari challenging the denial of his application for leave to file a successive petition was denied in 2003. (I App. 49; *Cooper*, 538 U.S. 984.)

Petitioner filed a request in October 2002, in San Diego County Superior Court, for mitochondrial DNA testing of hairs, and in June 2003 he requested testing of the T-shirt, for purposes of showing tampering. The state trial court held an evidentiary hearing where original crime-scene criminalists and personnel from the San Bernardino County Sheriff's Department and the San Diego County Superior Court testified. San Diego County Superior Court Judge William H. Kennedy concluded that Petitioner had not made "any showing that law enforcement personnel tampered with or contaminated any evidence in his case." Petitioner's request for further testing was denied and the state trial court found no merit to Petitioner's allegations of evidence tampering. (I App. 49, 86; II App. 436, n.1.)

Petitioner also filed a petition for writ of habeas corpus in this Court on February 11, 2003, and a second petition for writ of habeas corpus in this Court on May 15, 2003. These petitions were denied on April 21, 2003, and October 6, 2003, respectively. (I App. 48-49; *In re Cooper*, 538 U.S. 976 (2003); *In re Cooper*, 540 U.S. 808 (2003).)

On December 17, 2003, the San Diego County Superior Court set an execution date of February 10, 2004. (I App. 50.) On January 20, 2004, Petitioner filed his sixth petition for writ of certiorari in this

Court challenging the denial of his fifth state habeas petition by the California Supreme Court and seeking a stay of his execution. This Court denied the petition and application for stay on February 9, 2004. (I App. 50; *Cooper v. California*, 540 U.S. 1172 (2004).)

Petitioner delayed nearly six months following the evidentiary hearing and denial of relief by the San Diego County Superior Court before filing his sixth petition for writ of habeas corpus in the California Supreme Court on February 2, 2004. The California Supreme Court denied his petition on its merits on February 5, 2004, and also found that it was procedurally barred. The court concluded: "As with the previous five petitions for writ of habeas corpus that petitioner has filed in this court challenging the judgment, this petition casts no doubt on petitioner's guilt or the validity of the judgment." On February 5, 2004, Petitioner filed a sixth volume of exhibits in support of the petition for writ of habeas corpus after the denial of his sixth state habeas petition. On February 6, 2004, the California Supreme Court deemed Petitioner's submission a habeas petition (his seventh), and denied that petition on its merits on February 9, 2004.[3] (I App. 49, 51-52, 86-87.)

---

[3] Prior to Petitioner being granted an eleventh-hour stay of execution in 2004, and being permitted to file his third federal habeas petition in the district court, the California Supreme Court had denied Petitioner's seven habeas petitions, three motions to recall the remittitur issued in his direct appeal, and a petition for writ of mandate. (I App. 45-52.)

On February 6, 2004, Petitioner sought a stay of his execution from the Ninth Circuit, and requested leave to file a third federal habeas petition. On February 7, 2004, Petitioner filed his seventh petition for writ of certiorari in this Court and requested a stay of execution. This Court denied the petition and application for stay on February 9, 2004. (I App. 52; *Cooper*, 540 U.S. 1172.) A three-judge panel of the Ninth Circuit denied Petitioner's application for leave to file a successive petition on February 8, 2004. On February 9, 2004, the Ninth Circuit sua sponte agreed to hear Petitioner's application for leave to file a successive habeas petition *en banc*. (I App. 52; *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004).

On February 9, 2004, hours before Petitioner's scheduled execution, a majority of an *en banc* panel found that Petitioner had stated a prima facie case for relief as to one habeas claim that justified a stay of execution and granted permission to file a successive habeas petition. *Cooper*, 358 F.3d 1117. The court concluded that the declaration from former CIM Warden Midge Carroll made a prima facie case that law-enforcement authorities had withheld material exculpatory evidence. *Id*, at 1121. Moreover, the Court found that Petitioner made a prima facie showing the information from former Warden Carroll could not have been previously discovered through the exercise of due diligence. The Ninth Circuit expressly noted, in discussing

Petitioner's *Brady*[4] claim, that "Cooper also attaches a sworn declaration of his present counsel stating that Cooper's investigators became aware of the information contained in Warden Carroll's declaration on January 30, 2004, the date the declaration was signed." (I App. 52; II App. 288; *Cooper*, 358 F.3d at 1121.)

On March 19, 2004, the State filed a petition for writ of certiorari in this Court challenging the jurisdiction of the Ninth Circuit to grant authorization to file a successive petition after a three-judge panel has denied authorization. The State's petition was denied on May 17, 2004. (I App. 52.)

Despite the claim of newly-discovered evidence on which the Ninth Circuit issued its eleventh-hour stay of execution and granted Petitioner authorization to file a third federal habeas petition, testimony during the evidentiary hearing on remand to the district court showed that Petitioner's defense had known about the factual basis of his *Brady* claim based on former Warden Carroll's declaration for years before it was presented to the Ninth Circuit in February of 2004.[5] (I App. 212 & n.41.) Also, despite

---

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

[5] The Ninth Circuit's earlier conclusion that the information from Warden Carroll was both material and exculpatory rested on the belief that if Warden Carroll had testified, and the jury believed her, "the jury would have known that Cooper almost certainly was not wearing 'Pro Ked Dude' shoes." *Cooper*, 358 F.3d at 1122. But Petitioner never contended he was not issued Pro-Keds Dude shoes by the (continued...)

the *en banc* majority's optimistic prediction in February 2004 that "[t]he district court may be in a position to resolve this case very quickly," that became impossible when the Ninth Circuit backed up Petitioner in his demand for mitochondrial DNA testing of blond hairs found in Jessica Ryen's hands and for testing of the presence of the preservative EDTA on a T-shirt that had never been used as evidence against Petitioner in securing his conviction. (I App. 120, 122-123; II App. 294.) After complying with the Ninth Circuit's unnecessary order to test the T-shirt, the district court observed that "over one year after the remand, the process has not been 'quick,' as Petitioner promised." (I App. 123.)

Notwithstanding the State's contention that EDTA testing results were inadmissible under the Federal Rules of Evidence and that the testing itself did not satisfy the standards for reliability established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the district court ordered that the testing be conducted

---

(...continued)
prison; indeed, he had admitted wearing them at the time of his escape. Petitioner's actual claim was that the prosecution contended the Pro-Keds Dude shoe was only available through prisons when it was supposedly readily available at retail stores such as Sears. The only support for Petitioner's claim came from former CIM Warden Carroll, and the hearsay information she imparted was incorrect: Accurate information on this point, *i.e.*, the corporate sales records and testimony of an executive with the company that manufactured and sold the brand and model of shoe, had been presented to Petitioner's jury during trial. (I App. 208-228.) The stay Petitioner obtained in 2004 caused more than five years of additional delay.

as the Ninth Circuit had directed. (I App. 125.) The district court ultimately concluded that EDTA testing did not satisfy the standards for reliability *established* by *Daubert* and the Federal Rules of Evidence. (I App. 140-155.) The district court's ruling was based on findings that: (1) in the only case in which EDTA test results by Dr. Ballard (Petitioner's EDTA expert) were offered into evidence, the court soundly rejected both the credibility of Dr. Ballard and the reliability of EDTA testing in ruling the evidence inadmissible (I App. 145-150); (2) the application of EDTA testing in a forensic context has not been scientifically accepted and has not been subjected to either peer review or publication (I App. 151-152); and (3) there are no standard EDTA levels against which test results can be compared, permitting significant manipulation of the results and preventing definitive conclusions (I App. 152-155). The district court also found, separate and apart from its "serious concerns about the reliability of EDTA testing," that Dr. Ballard's test results did not support Petitioner's claim of tampering. (I App. 156.)

The court-ordered mitochondrial DNA testing of hairs recovered from the hands of Jessica Ryen did not show that someone other than Petitioner committed the murders. The testing confirmed that the hairs most likely came from one or more of the victims, and failed to identify another assailant. These results were consistent with the examination and assessment of the hair evidence performed by Petitioner's expert at the time of trial. The district

court explained that the result of the testing "should not be surprising," given that there was a large amount of blood on the victims and a large amount of hair on the debris-ridden carpet, and that each victim had sustained hatchet wounds to their heads, causing clumps of hair to fall to the ground. (I App. 108-109, 116-117.)

The district court also held extensive evidentiary hearings at which 42 witnesses testified with respect to all issues encompassed in Petitioner's third federal habeas petition. The district court issued a comprehensive 159-page decision addressing each of Petitioner's nine habeas claims. (I App. 2, 32; II App. 437, n.1.)

The three-judge panel of the Ninth Circuit affirmed the district court's denial of Petitioner's third federal habeas petition, noting the tests that Petitioner claimed would establish his innocence "show nothing of the sort." (I App. 2, 32; II App. 437, n.1.) Petitioner's motion for rehearing and for *en banc* rehearing was denied by the Ninth Circuit. (II App. 434.)

It is against this procedural history that Petitioner has filed his tenth Petition in this Court.

ARGUMENT

Petitioner contends certiorari is warranted in this case to: (1) decide whether it violates the Eighth Amendment to execute someone who is actually innocent; (2) provide guidance to lower courts regarding the fact-finding procedures that should be

afforded a petitioner attempting to prove an actual-innocence claim; (3) resolve a split of authority among the circuits over whether the gateway standard for innocence enunciated in *Schlup v. Delo*, 513 U.S. 298, 316 (1995), has been superceded by enactment of 28 U.S.C. § 2244(b); and (4) resolve a split of authority over whether a *Brady* claim in a successor petition is properly subjected to a gateway innocence requirement. (Pet. at 21-38.) Certiorari is not warranted to address the questions raised in the pending Petition. Those questions were not actually reached below, and the Ninth Circuit's decision affirming the district court's denial of relief does not conflict with any decision of this Court or any other court of appeals. Moreover, this case is not an appropriate vehicle to consider the questions presented because they rest on an unfounded factual predicate: that Petitioner is innocent. Further review of Petitioner's highly fact-bound claim is therefore unwarranted.

1. In *Herrera v. Collins*, 506 U.S. 390, 420 (1993), "this Court assumed without deciding that 'in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.'" *House v. Bell*, 547 U.S. 518, 535 (2006), quoting *Herrera*, 506 U.S. at 417. Petitioner argues that certiorari is warranted for this Court to resolve what it had assumed in Herrera and in its recent remand in *In re Davis*, No. 08-1443, 2009 WL 2486475 (U.S., Aug. 17, 2009).

(Pet. at 21-23.) But Petitioner's suggestion is unavailing because Petitioner is clearly not innocent. Moreover, the district court's and circuit court's treatment of Petitioner's innocence claim was completely faithful to this Court's teachings.[6]

Petitioner suggests otherwise, noting that neither the district court nor the Ninth Circuit had the benefit of this Court's decision in *Davis*, resulting in their failure to apply the "clearly establishes" standard to his freestanding actual-innocence claim. (Pet. at 22.) In *Davis*, this Court remanded the original habeas petition to the district court for the purpose of receiving testimony and making findings of fact concerning whether evidence that could not have been obtained at the time of trial "clearly establishes" Davis's innocence. *In re Davis*, 2009 WL 2486475 at *1. But the decision below is not contrary to this Court's decision in *In re Davis*, which articulates no burden of proof for a freestanding innocence claim. Indeed, as Petitioner concedes, Davis did not even resolve whether such a claim is cognizable on federal habeas. (Pet. at 21.) This Court, by delegating the fact-finding function to the

[6] California permits freestanding innocence claims to be presented on habeas corpus. *See In re Clark*, 5 Cal. 4th 750, 766 (1993). Accordingly, Petitioner's case does not fall within the procedural parameters of the federal habeas remedy for actual innocence that was assumed in *Herrera*, as the State has available avenues to address innocence claims brought by state prisoners. The California Supreme Court heard and denied Petitioner's actual-innocence claim on its merits, and the Governor of California denied executive clemency, prior to Petitioner's scheduled execution in 2004.

federal trial court on an original habeas petition, did not purport to announce the standard of proof a prisoner must meet in order to prevail on a freestanding claim of innocence.[7]

There certainly can be no rationale for imposing a lesser burden of proof for demonstrating innocence in the context of a freestanding innocence claim than this Court requires for a gateway innocence claim. In *Herrera*, this Court observed that a freestanding claim of actual innocence would require "a truly persuasive demonstration" of "actual innocence," and "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." *Herrera*, 506 U.S. at 417.

"[P]risoners asserting innocence as a gateway to defaulted claims must establish that in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House*, 547 U.S. at 536-537, quoting *Schlup*, 513 U.S. at 327. As this Court emphasized in *House*, "the *Schlup* standard is

---

[7] A further indication that this Court, by its two-sentence transfer order in *Davis*, did not erect an authoritative standard of proof can be found in the concurring statement of Justice Stevens, joined by Justices Ginsburg and Breyer, which hypothesizes a situation in which "new evidence conclusively and definitively prov[es], beyond any scintilla of doubt," that a prisoner is innocent. *See In re Davis*, 2009 WL 2486475 at *1.

demanding and permits review in only the 'extraordinary' case." *House*, 547 U.S. at 538, quoting *Schlup*, 513 U.S. at 327. Accordingly, the decisions of the Ninth Circuit and district court concluding that Petitioner could not make the requisite showing for a freestanding actual-innocence claim because he could not satisfy either the *Schlup* standard or 28 U.S.C. § 2244(b) are not contrary to the jurisprudence of this Court, or any other circuit court.

This Court has recognized the "unparalleled ability" of DNA testing "both to exonerate the wrongfully convicted and to identify the guilty" and to "provide powerful new evidence unlike anything known before." *District Attorney for Third Judicial District v. Osbourne*, ___ U.S. ___, 129 S. Ct. 2308, 2312, 2316 (2009). Indeed, in this case, the agreed-upon post-conviction DNA testing conducted to allow Petitioner to prove his innocence only further inculpated him and confirmed the overwhelming evidence of his guilt presented in his state-court trial.

Petitioner's innocence claim contrasts sharply with the claim advanced in *House*, which was found to satisfy *Schlup*'s gateway innocence standard. In *House*, there was "no dispute" that House had "presented some new reliable evidence," and that the state had "conceded as much." *House*, 547 U.S. at 537. In direct contravention of evidence presented at trial, DNA testing established that semen on the victim's nightgown and panties came from her husband, not House. The State conceded the point, but argued the new evidence was immaterial.

Id. at 540. Petitioner's case presents the opposite situation faced in *House*, *i.e.*, Petitioner was afforded post-conviction DNA testing and the results *confirmed* his guilt.

As the Ninth Circuit three-judge panel found:

> We agree with the district court's conclusion that all of Cooper's challenges "have come back the same: there is overwhelming evidence that Petitioner is the person guilty of these murders." Order at 15854. Considering all the evidence, new and old, Cooper has not shown that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 327, 115 S.Ct. 851; *see House*, 126 S.Ct. at 2076-78 ....

(I App. at 27.)

Whatever standard might be applied, there is no credible evidence that anyone other than Petitioner "chose to slaughter a father, a mother, and two children in the sanctity of the Ryen home, and leave another child barely clinging to life." (I App. 107.) The absurdity of Petitioner's "innocence" hypothesis was recognized by the California Supreme Court in his direct appeal, and nothing that has transpired since has cast any doubt on Petitioner's guilt:

> It is utterly unreasonable to suppose that by coincidence, some hypothetical real

> killer chose this night and this locale to kill; that he entered the [hideout] house just after defendant left to retrieve the murder weapons, leaving the hatchet sheath in the bedroom defendant used; that he returned to the [hideout] house to shower; that he drove the Ryen station wagon in the same direction defendant used on his way to Mexico; and that he happened to wear prison issue tennis shoes like those of defendant, happened to have defendant's blood type, happened to have hair like defendant's, happened to roll cigarettes with the same distinctive prison issued tobacco, and so forth. Defendant sought to discredit or minimize each of these items of evidence, but the sheer volume and consistency of the evidence is overwhelming.

People v. Cooper, 53 Cal. 3d at 800.

Petitioner contends that the forensic evidence and testimony against him have "since been shown to be completely unreliable." (Pet. 9.) Nothing could be further from the truth. Post-conviction DNA testing *confirms* Petitioner's guilt. The post-conviction DNA testing of items identified as forensically significant by Petitioner's expert, Dr. Blake, further inculpated Petitioner by confirming his presence in the Ryen home (where he left his blood), and inside the stolen Ryen station wagon (where he left two cigarette butts). Petitioner has been further incriminated by

the T-shirt recovered from the side of the road about two miles from the Ryen home, which has been found to contain both Petitioner's and his victim's DNA. (I App. 160-165.) Every federal and state court that has considered the evidence has roundly rejected Petitioner's innocence claim.

In urging this Court to grant certiorari, Petitioner highlights the views expressed in Judge Fletcher's dissent. (Pet. at 3, 7, 10, 12, 18, 20-21, 24.) But as Judge Rymer aptly noted in her concurrence to the order denying *en banc* review:

> ... The dissent improperly marshals the facts in the light most favorable to Kevin Cooper, yet the evidence was resolved against Cooper at trial — after he took the stand and testified — and at each step of the post-conviction proceedings. The dissent also approaches the issues as if they were new, yet the same issues have been on the table since day one (except for DNA testing which didn't exist at the time and which has turned out to be inculpatory).... All were known at the time of trial and have been litigated in one forum or another, unfavorably to Cooper, for the last 24 years.

(II App. 435.)

In addition to impermissibly drawing inferences against the judgment (*see House*, 547 U.S. at 538, quoting *Schlup*, 513 U.S. at 330), Judge Fletcher's

dissent ignored critical credibility determinations. Petitioner testified at trial, and his "implausible story about what he did at the [hideout] house and how he left for Mexico" was disbelieved by the jury. As the district court noted, "the prosecution effectively cross-examined Petitioner by pointing out inconsistencies in Petitioner's account and questioning Petitioner's credibility." (I App. 81.) It counts very little that "[f]rom the time of his initial arrest until today, Kevin Cooper has consistently maintained his innocence of the murders for which he has been convicted." (II App. 306.)

Conspicuously absent from Judge Fletcher's dissent is any acknowledgment that the case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The California Supreme Court's rejection of Cooper's freestanding actual-innocence claim is not only not unreasonable in any regard, but it is plainly correct. (*See* I App. 168-184; 239.) Even if AEDPA would not affect the disposition of a freestanding claim of actual innocence, an understanding of AEDPA's purpose would nevertheless inform the judiciary's consideration of such a claim. *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998). Thus, whether the standard enunciated in *Schlup* or in 28 U.S.C. § 2244 is used to evaluate Petitioner's innocence claim, it is clear that any showing of actual innocence must be predicated on new and reliable evidence not presented at trial. *See Schlup*, 513 U.S. at 324; *Calderon*, 523 U.S. at 559; 28 U.S.C. § 2244(b). Yet, Judge Fletcher's dissent relies on matters already

presented to the jury over two decades ago.[8] These same matters were also addressed in Petitioner's

---

[8] Judge Fletcher discusses matters that were known to the defense at the time of trial, and which were for the most part presented to the jury. (*See* II App. 312 [valuables not taken from Ryen home], 313 [keys left in stolen station wagon, couple observing car traveling away from Ryen home], 313, 371-381 [statements by Josh Ryen about three men], 314 [multiple-assailant theory based on number of wounds/weapons used], 315-321, 407-412 [third-party culpability theory involving Lee Furrow and destruction of pair of "bloody coveralls" given to a sheriff's deputy by Diana Roper], 321-325 [statements attributed to Kenneth Koon by mental patient Anthony Wisley], 326-328 [third-party culpability theory involving three white male strangers at Canyon Coral Bar night of the murders], 335 [color of Petitioner's prison-issue jacket] 384-386 [testing of drop of blood (A-41)], 331, 387-390 [circumstances of recovery of shoe prints], 334, 390-391 [recovery of tobacco/cigarette-butt evidence], 392-394 [recovery of hatchet sheath and jacket button], 330-332 [information regarding purchase of prison-issued Pro-Ked Dude shoes, including availability in a wholesale catalogue for retailers, and circumstances of issuance of shoes to Petitioner], 412-416 [reference to "blue" shirt in Sheriff's log]; *compare*, I App. 189-192, 196 [third-party culpability evidence at trial *re* three strangers at Canyon Coral Bar], 214-216, 221-222, 224-225 [trial evidence *re* purchases of Pro-Ked Dude shoes] 229 [Josh Ryen's statements], 230 [multiple assailant theory], 231-232 [third-party culpability evidence *re* Lee Furrow], 235-237 [statements attributed to Kenneth Koon by mental patient Anthony Wisley], 242-243 [trial testimony *re* destruction of coveralls], 259-262 [sheriff's logs referencing "blue" shirt provided to defense before trial], 266-267 [testing of drop of blood A-41]; II App. 435 [Josh Ryan's statements, handling of drop of blood A-41, presence of three strangers at Canyon Coral Bar, three white men seen driving on road leading away from Ryen home, Petitioner's shoes and whether they were responsible for incriminating shoe prints, destruction of bloody coveralls linked to Lee Furrow, where sheath found, whose blood on tan T-shirt, cigarette butts in Ryen station wagon, whether there was blue shirt, police incompetence, mishandling of evidence, and chain of custody

(continued...)

direct appeal and in numerous habeas petitions in both state and federal court. "To put Petitioner's innocence claim in perspective, the primary newly discovered evidence pertaining to the T-shirt is that it is stained with Petitioner's blood." (I App. 207.) Further, Petitioner's claim that blood was planted on the T-shirt is not only unfounded,but nonsensical, as it ignores the fact that the T-shirt was never used at trial as evidence against him.

Judge Fletcher's rejection of state- and federal-court factual findings indulges in a theory of tampering even more far-fetched than the theory that Petitioner himself advanced in the state and federal courts. Anyone planting the minute quantity of Petitioner's blood on the T-shirt before Petitioner's state-court trial would have had to be prescient, for the Nobel-Prize-winning science that would reveal the inculpatory nature of that evidence had not yet been developed. Significantly, it was proven in the state court that the portion of the T-shirt that was subsequently discovered to contain Petitioner's and Doug Ryen's DNA had been in the *continuous* custody of the San Diego County Superior Court evidence clerk since the time of trial. (I App. 165-166.) Judge Fletcher theorizes:

> [I]f state actors did plant Cooper's blood on the T-shirt, they likely did so long after trial — after DNA technology became

---

(...continued)
problems].)

> available and after Cooper requested that DNA testing be performed on the T-shirt.

(II App. 338.)

Thus, Judge Fletcher's dissent implies without support that San Diego County Superior Court personnel planted evidence against Petitioner after he was convicted.[9] Like other unfounded allegations in the dissent, this one ignores the participation of Petitioner's experts in pre-trial, trial and post-conviction testing of evidence. Notably, Dr. Blake, Petitioner's designated expert, was involved in the analysis of the evidence pre-trial, during trial, and in the post-conviction nuclear DNA testing (*see* I App. 162, 184, 267, 270); and Dr. Blake has never supported or substantiated any of the implausible accusations of evidence tampering allegations asserted by Petitioner (and reflected in Judge Fletcher's dissent). For these reasons and others ably identified in Judge Rymer's opinion (*see* II App. 434-446), Judge Fletcher's dissent does not support any reason for this Court to grant review.[10]

---

[9] It is unclear whether the dissent's reference to "state actors" extends to the California Department of Justice (DOJ) DNA Laboratory. Such an accusation would be easily refuted by the fact that DOJ DNA Laboratory did not receive Petitioner's blood sample from the San Bernardino Sheriff's Department Crime Laboratory, or the sample of his blood drawn on death row in 2001, until *after* it already typed the evidence items (in the presence of Petitioner's designated expert, Dr. Blake). (I App. 162.)

[10] Judge Fletcher's dissent characterizes the "eyewitness (continued...)

2. Petitioner also argues that certiorari is warranted so this Court can provide guidance to lower courts regarding the fact-finding procedures that should be afforded to a petitioner, and the "nature and extent of evidentiary hearings" at which an actual-innocence claim might be explored. (Pet. at 21, 23-25.) Petitioner does not explain why the existing rules, statutes, and judicial pronouncements are insufficient in that regard. Petitioner's mere disagreement over the district court's evidentiary rulings on discovery and evidentiary matters is not a basis for further review.

The dissent states: "There is no way to say this politely. The district court failed to provide Cooper with a fair hearing and flouted our direction to perform the two tests." (II App. 310.) But, as Judge Rymer makes clear, "[t]he district court did no such thing." (II App. 441.) The district court held a tutorial on EDTA testing and "requested submissions on a variety of testing-related issues which the parties provided after consulting with their experts, participated in numerous hearings and conferences

---

(...continued)
testimony of Josh Ryen" as among "the most important evidence against Cooper at trial." (II App. 238.) Yet the California Supreme Court did not rely on any statements by Josh Ryen when concluding that it was "utterly unreasonable to suppose that by coincidence, some hypothetical real killer chose this night and this locale to kill." *People v. Cooper*, 53 Cal. 3d at 837. Likewise, the district court did not refer to Josh Ryen's statements when detailing the trial-court findings and overwhelming evidence of Petitioner's guilt. (I App. 168-184.) Petitioner's conviction does not rest on the "eyewitness" testimony of eight-year-old Joshua Ryen.

over a three-month period to develop a protocol, ordered the two tests to be conducted, resolved problems that came up during the process, analyzed the results, and issued a thoughtful 159-page ruling that discusses in meticulous detail all aspects of the testing as well as each claim in Cooper's petition." (II App. 441.)

Petitioner claims he was not afforded an opportunity in the district court to prove his innocence, and relies on Judge Fletcher's dissent in support of that contention. (Pet. at 24.) That dissent complains about "unreasonable conditions on the testing" and takes exception with the district court's rulings regarding the admissibility of the EDTA test results. (II App. 310, 338-341.) However, as Judge Rymer notes:

> The district court did the job it was required to do under *Daubert* [], 509 U.S. [at] 589 [ ] — determine whether EDTA testing is scientifically valid. The district court concluded that the analysis by Cooper's expert did not pass muster. There is no evidence that the methodology Cooper's expert espoused has been, or can be, tested. No other scientists regularly perform this kind of testing. There are no industry standards regarding proper testing protocol, and we have no idea how the history of each specimen's exposure to environmental EDTA will affect the sample and, in turn, the testing. There is no 'normal' base level of EDTA. EDTA

> testing has only been offered to courts on two occasions, and in the one proceeding in which it was challenged, Cooper's expert was involved and both his qualification, and his EDTA testing, were rejected as biased and flawed. Thus, the district court appropriately exercised its gate-keeping discretion to exclude EDTA testing as unreliable.

(II App. 441-442.)

As Judge Rymer also points out, Judge Fletcher's dissent ignores the requirement that a district court's findings not be set aside unless clearly erroneous (*Knowles v. Mirzayance*, ___ U.S. ___, 129 S. Ct. 1411, 1419 (2009). Instead, the dissent

> assesses the EDTA evidence from scratch (including evidence that was withdrawn), and substitutes its own findings for those of the district judge — based on charts and graphs and regression analysis that it has crafted. No court, let alone this court on appellate review, may consider evidence that an expert does not stand behind, nor may we reject a district court's findings of fact — informed by the record before that court — by manipulating data in a way that appears better and brighter to us.

(II App. 442-443.)

Petitioner's inability to demonstrate innocence had nothing to do with the district court's application of familiar rules governing discovery and the admissibility of evidence.[11] It is also simply not true that Petitioner has "never been permitted the opportunity to prove his innocence" despite "substantial evidence" he did not murder the Ryens and Christopher Hughes. (Pet. at 21.) Instead, his inability to prove his innocence stems from the fact that he is so plainly guilty. Further review of Petitioner's highly fact-bound case is unwarranted.

3. Petitioner next argues that certiorari should be granted to resolve whether the gateway innocence standard articulated in *Schlup* has been superceded

---

[11] In assailing the district court's rulings, the dissent advances the novel proposition that the district court denied Petitioner's due process rights "to participate when important decisions are made" by not permitting a representative of Petitioner to be present during the selection and preparation of the stain and controls from the T-shirt. (II App. 344-345.) But the district court appointed an expert that both parties agreed was well qualified to select and prepare the controls for the EDTA testing only after Petitioner's expert declined to participate. After three months of proceedings relating to the testing protocol, Petitioner's expert notified the court at the last minute that he would not participate unless the court permitted a testing protocol to be developed independently of the court. (II App. 345.) Due process would not compel any court to accept such a demand by an expert in a third federal habeas proceeding in which the Petitioner could not sustain his burden for being heard on the merits on a single habeas claim, let alone demonstrate entitlement to testing that did not meet the standards for admissibility under Daubert or the Federal Rules of Evidence. *See, e.g., Medina v. California*, 505 U.S. 437, 445-446 (1992); *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. at 2319-2320.

for successive habeas petitions by 28 U.S.C. § 2244(b). (Pet. at 25-31.) But this question is not implicated in these proceedings. It was not necessary for the district court or the circuit court to determine whether *Schlup* or § 2244(b) controlled Petitioner's gateway innocence claim, because he could not meet either standard. In addition, all of Petitioner's habeas claims in his successive petition were heard on the merits; so further review by this Court of the legal question Petitioner identifies would not affect the outcome of Petitioner's case.

Petitioner suggests that certiorari be granted to resolve an alleged conflict among the circuits regarding the controlling gateway innocence standard for successive habeas claims. (Pet. at 25-31.) Petitioner says that the Eleventh Circuit has concluded that the *Schlup* standard has been superceded by § 2244(b). (Pet. at 27 [citing *Jordan v. Secretary of Dept. of Corrections*, 485 F.3d 1351, 1359 (11th Cir. 2007)].) But the Eleventh Circuit merely held that it could not ignore the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and therefore had to apply 28 U.S.C. § 2244(b) to a coerced confession claim. *Jordan*, 485 F.3d at 1359. Nothing in *Jordan* conflicts with Petitioner's case, in which both the *Schlup* standard and § 2244(b) were applied to successive petition claims. The same is true for the Third Circuit case cited by Petitioner, where the court found the petitioner could not meet the requirements of § 2244(b) or *Schlup*. (*See* Pet. at 27, citing *Goldblum v. Klem*, 510 F.3d 204, 205 (3rd Cir.

2007).) Petitioner also argues that courts have conflated the two standards such that it is difficult to know what standard is being applied. (Pet. at 27.) But in the one case Petitioner cites in his effort to illustrate that state of affairs, neither *Schlup* nor § 2244(b) could be met, and thus successive *Brady* claims could not be addressed on the merits. *Lott v. Bagley*, 569 F.3d 547, 547 (6th Cir. 2008). Accordingly, Petitioner has not shown that this case implicates any conflict among the circuits warranting a grant of certiorari.

4. Petitioner next argues that certiorari is warranted to provide guidance on whether a *Brady* claim presented in a successor petition requires any gateway showing of innocence at all. Petitioner reasons that no showing more onerous than that required for relief for a *Brady* claim is appropriate. (Pet. at 33.) But cases from the Ninth and Tenth Circuits where the question was never reached do not "conflict" with those cases from the Fourth and Eleventh Circuits in which § 2244(b) was applied to *Brady* claims. (Pet. at 35-36, citing *Evans v. Smith*, 220 F.3d 306 (4th Cir. 2000); *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257 (11th Cir. 2009).) Whether successive *Brady* claims are exempt from gateway innocence requirements was not reached below, so the decision by the Ninth Circuit also creates no conflict. Indeed, Petitioner's successive *Brady* claims were heard on the merits notwithstanding his inability to meet either the *Schlup* standard or the requirements of § 2244(b).

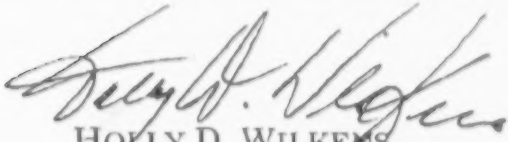
CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: October 27, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DONALD E. DENICOLA
Deputy State Solicitor General
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
RONALD S. MATTHIAS
Senior Assistant Attorney General



HOLLY D. WILKENS
Supervising Deputy Attorney General
Counsel of Record

Counsel for Respondent

HDW:sm
SD2009702266
70221072.doc

Supreme Court, U.S.
FILED
NOV 9 - 2009
OFFICE OF THE CLERK

144

(6)

No. 09-363

In the Supreme Court of the United States

KEVIN COOPER,

Petitioner,

v.

ROBERT K. WONG, ACTING WARDEN, SAN QUENTIN STATE PRISON, SAN QUENTIN, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

David T. Alexander
Law Office of David T. Alexander
332 Sheridan Avenue
Piedmont, CA 94611
Telephone: (650) 387-4382
Facsimile: (510) 654-3773

*Norman C. Hile
ORRICK, HERRINGTON & SUTCLIFFE LLP
400 Capitol Mall
Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7900
Facsimile: (916) 329-4900

Counsel for Petitioner

November 9, 2009

* Counsel of Record

TABLE OF CONTENTS

Page

INTRODUCTION 1

QUESTION 1: IS A PERSON CONVICTED OF MURDER, BUT LATER SHOWN TO BE INNOCENT, ELIGIBLE FOR EXECUTION? 1

QUESTION 2: WHEN A DISTRICT COURT MUST CONDUCT AN EVIDENTIARY HEARING WITH RESPECT TO EVIDENCE OF INNOCENCE IN A SUCCESSIVE HABEAS PETITION, WHAT PROCESS IS REQUIRED TO CONDUCT A FULL AND FAIR HEARING TO AFFORD FOR A RELIABLE DETERMINATION? 5

QUESTION 3: WHEN A HABEAS CORPUS PETITIONER HAS BEEN ALLOWED TO FILE A SUCCESSIVE PETITION IN A FEDERAL DISTRICT COURT, WHAT STANDARD APPLIES? 8

A. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER *SCHLUP* OR 2244(B) APPLIES FOR EVALUATING CLAIMS OF ACTUAL INNOCENCE IN SUCCESSIVE PETITIONS 8

B. THIS COURT SHOULD GRANT THE WRIT TO DECIDE HOW TO TREAT SUCCESSIVE PETITIONS THAT INCLUDE CLAIMS UNDER *BRADY V. MARYLAND* 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases Page(s)

Brady v. Maryland,
373 U.S. 83 (1963) 1, 11, 12

Calderon v. Thompson,
523 U.S. 538 (1998) 5, 9

House v. Bell,
547 U.S. 518 (2006) 3, 4, 5

Dickerson v. United States,
530 U.S. 428 (2000) 12

Florida v. Rodiguez,
469 U.S. 1 (1984) 7

Fuller v. Oregon,
417 U.S. 40 (1974) 11

Goldblum v. Klem,
510 F.3d 204 (3d Cir. 2007) 10

Herrera v. Collins,
506 U.S. 390 (1993) 3, 4

In re Davis,
2009 WL. 2486475 (2009) 1, 3

Inyo County, Cal. v. Pointe-Shoshone Indians,
538 U.S. 701 (2003) 2

Rinaldi v. U.S.,
434 U.S. 22 (1977) 2

Rompilla v. Beard,
545 U.S. 374 (2005) 2

Rush Prudential HMO, Inc. v. Moran,
536 U.S. 355 (2002) 9

Schlup v. Delo,
513 U.S. 298 (1995) ..... *passim*

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 9

U.S. v. Beggerly,
524 U.S. 38 (1998) 7

Federal Constitution, Statutes, Regulations, and Legislative History

28 U.S.C.
§ 2244(b) ..... *passim*

Other Sources Cited

Matt Lait & Scott Glover, *Bruce Lisker Won't Be Retried for 1983 Slaying of His Mother*, L.A. TIMES, Sept. 22, 2009, at A1 2

Sandra Svoboda, *Tale of Two Homicides*, DETROIT METRO TIMES, Oct. 28, 2009, available at http://www.metrotimes.com/news/story.asp?id=14504 2

Kevin Sack, *Brothers Freed in Rape Case are Likely to Face Retrial*, N.Y. TIMES, Dec. 24, 1997, at A10 2

Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. OF L. AND SOC. SCI. 173 (2008) 2

Facts on Post-Conviction DNA Exonerations, Innocence Project, http://www.innocenceproject.org/news/Fact-Sheets.php 2

INTRODUCTION

The State's Brief in Opposition ignores the district court's distorted fact-finding process, the substantial evidence of Cooper's innocence, and the compelling reasons why this Court should ameliorate the lower courts' inconsistent approaches in a critical area of law. Although the State asks for blind reliance on "finality," it forgets that the circuit court is virtually split on the issue of Cooper's guilt or innocence, and that eleven judges publicly stated that Cooper should be given a fair hearing before the State is permitted to execute him.

Most important, the Opposition does not dispute the need for this Court to resolve: (1) how lower courts should deal with the conflict among *In re Davis*, 2009 WL 2486475 (2009), *Schlup v. Delo*, 513 U.S. 298 (1995), and § 2244(b); and (2) how the addition of Constitutional claims under *Brady v. Maryland*, 373 U.S. 83 (1963), complicates that conflict. In short, this case directly presents a proper vehicle for this Court to clarify the standard a petitioner must meet to establish actual innocence and to set guidelines for lower court fact-finding before applying that standard.

QUESTION 1: IS A PERSON CONVICTED OF MURDER, BUT LATER SHOWN TO BE INNOCENT, ELIGIBLE FOR EXECUTION?

The State never truly addresses the Petition's first question. Rather, the State avoids the issue, asserting that Cooper is not innocent. Opp. 17. One cannot rely on the State's assessment of innocence after it botched evidence preservation at the crime

scene, made Cooper its exclusive target a few days after the murders, destroyed potentially exculpatory bloody coveralls, presented false trial testimony about Pro-Ked's availability, and now cannot produce the missing blue shirt. As history shows, the prosecution is often the last to concede that it convicted the wrong person.[1]

Cooper's innocence is much more accurately evaluated by considering that an impartial tribunal, the circuit court, is virtually divided on the question, with at least eleven judges stating that Cooper should have a fair hearing to resolve this question. That alone is enough reason to grant the writ. *Inyo County, Cal. v. Pointe-Shoshone Indians*, 538 U.S. 701, 709 n.9 (2003) (certiorari granted to resolve "divergent views" within same circuit); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (reviewing decision of "divided" circuit); *Rinaldi v. U.S.*, 434 U.S. 22, 25 (1977) (same).

---

[1] *See, e.g.*, Matt Lait & Scott Glover, *Bruce Lisker Won't Be Retried for 1983 Slaying of His Mother*, L.A. TIMES, Sept. 22, 2009, at A1; Sandra Svoboda, *Tale of Two Homicides*, DETROIT METRO TIMES, Oct. 28, 2009, available at http://www.metrotimes.com/ news/story.asp?id=14504; Kevin Sack, *Brothers Freed in Rape Case are Likely to Face Retrial*, N.Y. TIMES, Dec. 24, 1997, at A10. In the last 30 years, over 400 people in the United States have been exonerated, more than 100 of whom had been sentenced to death. *See* Samuel R. Gross, Convicting the Innocent, 4 ANN. REV. OF L. AND SOC. SCI. 173 (2008); Facts on Post-Conviction DNA Exonerations, Innocence Project, http://www.innocenceproject.org/news/Fact-Sheets.php.

The State cites the California Supreme Court's 1991 opinion on direct appeal stating that the evidence of guilt was "overwhelming." Opp. 20-21. In 1991, however, that court did not have any of the recent evidence of innocence cited in the Petition at pages 7-15, further detailed in Judge Fletcher's opinion. App. 423-29. Perhaps the best refutation, however, is the State's own full page footnote listing trial and post-trial exculpatory evidence. Opp. 24, n.8.

Nor were the district court's or the three-judge panel's decisions below faithful, as the State asserts, to this Court's teachings. Opp. 17. In *In re Davis*, this Court remanded a petition presenting compelling evidence of innocence to the district court for a full and fair hearing to determine if the evidence "clearly establishes" innocence. Cooper has never received such a full and fair hearing. The rulings below thus violated this Court's teachings in *Davis*, *House v. Bell*, 547 U.S. 518 (2006), and *Herrera v. Collins*, 506 U.S. 390 (1993).

The State is correct in one sense: this Court has not yet articulated the precise standard for establishing actual innocence under *Herrera*. Opp. 17. Through this case the Court could establish that standard and set parameters for lower court discovery and fact-finding.

The State argues that Cooper cannot meet the *Herrera* standard because the three-judge panel below concluded he did not meet the *Schlup* standard. Opp. 19, 20. But Judge Fletcher's dissent finds just the opposite: that Mr. Cooper met the *Schlup* standard, as well as the more stringent

AEDPA test. App. 417.[2] Given the evidence of innocence Cooper presented in the district court despite being denied discovery and excluded from testing, one can only imagine what he could have developed in a fair proceeding.[3]

The State repeatedly refers to post-conviction DNA testing done on the t-shirt, cigarette butts and A-41. Opp. 7, 8, 21-22. The State fails to mention, however, that it was Cooper who sought this testing, while the State opposed it for several years. Why would Cooper seek such testing if he were not innocent? Once the testing was ordered, however, the State had ample opportunity to tamper with evidence in hopes of upholding the conviction. Evidence pointing to tampering is not only in the State's results reporting heightened levels of EDTA (which it then withdrew (App. 355-64)), but in the State's criminalist's unexplained 24 hours with A-41 (App. 386), and cigarette butts recovered from Cooper's car and the hideout house that are now missing (App. 391-92). Nine circuit judges who *sua sponte* voted to allow Cooper to file a successive petition in 2004, and eleven circuit judges who

---

[2] What the State's argument displays is that innocence jurisprudence contains at least five standards: (1) *Schlup*, (2) § 2244(b), (3) *Herrera*, (4) *Davis*, and (5) the constitutional standards used in a first petition. This shows why the circuit and district courts could use this Court's clarifying review.

[3] For instance, Cooper only learned about the blue shirt when the State introduced the sheriff call logs in 2004. Likewise, Cooper only learned about blood contamination of VV-2 in 2004 when Dr. Melton discovered it during her tests of the hairs.

dissented from denial of rehearing, were aware of these DNA results, but wanted Cooper to have a fair hearing about tampering.

Citing *Calderon v. Thompson*, 523 U.S. 538, 558 (1998), the State appears to claim that, as a result of AEDPA, only new, post-trial evidence can be part of a court's actual innocence analysis. Opp. 23. *Calderon* says nothing of the kind. Rather, this Court simply elucidated the proper standard ("miscarriage of justice") that courts should apply when deciding whether to withdraw a previously issued mandate. Regardless, the State's misguided premise about the affect of AEDPA shows how its enactment created uncertainty about its application in all innocence cases.

QUESTION 2: WHEN A DISTRICT COURT MUST CONDUCT AN EVIDENTIARY HEARING WITH RESPECT TO EVIDENCE OF INNOCENCE IN A SUCCESSIVE HABEAS PETITION, WHAT PROCESS IS REQUIRED TO CONDUCT A FULL AND FAIR HEARING TO AFFORD FOR A RELIABLE DETERMINATION?

To date, this Court has not described what proceedings are appropriate when, as part of a successive petition, a condemned prisoner seeks to prove his innocence. That was not necessary in *Davis* because no district court had yet heard the evidence to be presented in a successive petition. This case, however, presents that issue directly, because there is a record of unfair proceedings in a district court.

The State suggests that existing rules, statutes and judicial pronouncements on discovery and presentation of evidence for first petitions, which may not include innocence claims, are sufficient. Opp. 27. The record in this case shows they are not.

Cooper was denied due process with respect to the testing of forensic evidence in his case. Pet. 3-4; App. 341. It is fundamental that the party with the burden of proof should be allowed, within some appropriate boundaries, to design the forensic testing that he says could prove his claims. In this case, however, the district court excluded Cooper from any meaningful participation in the testing, and used its own uninformed thinking, along with that of the State, to design and implement the testing. App. 342-45. The result was a disaster: when the EDTA test results supported Cooper's assertion, the district court allowed them to be "withdrawn" without explanation. App. 352-53. Meanwhile none of the necessary preliminary analysis was done to show whether the tested stain contained Cooper's blood or DNA. App. 346-47. Similarly, the hairs that the district court sent for mitochondrial DNA testing had previously been excluded as potentially exculpatory. App. 421-22.

Compounding these errors, the district court denied Cooper any discovery. App. 310. It is axiomatic that a petitioner claiming innocence is severely hampered in obtaining forensic and other evidence in the hands of the prosecution. Because the current Rules Governing Section 2254 Cases permit discovery only with a district court's authorization, a district court may inadvertently or intentionally prevent a petitioner from obtaining

much of the existing forensic evidence proving innocence. Here, the district court denied Cooper any discovery on A-41 and the missing cigarette butts.

Cooper was further thwarted by the district court's limiting testimony at the evidentiary hearing. It refused to permit questioning Josh Ryen about his statements that the attackers were three white men. It denied Cooper's request to examine the criminalist who tested and later removed A-41 from the crime lab. It denied Cooper the opportunity to examine files a deputy reviewed looking for a phone message from Warden Carroll.

This Court has supervisory authority over the lower federal courts, and may grant a writ to correct errors and provide guidance on federal procedural rules. *Florida v. Rodiguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) (noting that Court has supervisory authority over lower courts and can perform pure error-correcting function); *U.S. v. Beggerly*, 524 U.S. 38 (1998) (supervisory authority extends to the construction of federal rules of criminal procedure). Granting the writ could provide standards to follow to allow innocence claims to be fully developed. It could also define when a new fact-finder should be assigned to make sure that an impartial innocence determination is made.

QUESTION 3: WHEN A HABEAS CORPUS PETITIONER HAS BEEN ALLOWED TO FILE A SUCCESSIVE PETITION IN A FEDERAL DISTRICT COURT, WHAT STANDARD APPLIES?

A. This Court Should Grant the Writ to Decide Whether *Schlup* or 2244(b) Applies for Evaluating Claims of Actual Innocence in Successive Petitions.

The State concedes that a question exists as to whether *Schlup* has been superseded by § 2244(b), and only contests whether this question is implicated in these proceedings. Opp. 31. As shown by the lower court decisions ruling on Cooper's successive petition, the question of whether to apply *Schlup* or § 2244(b) to newly discovered evidence of innocence is unsettled. Pet. 19. The State's position that the question need not be addressed might have been correct if every judge analyzing Cooper's claims agreed that he did not meet either standard. However, this simply is not the case.

The State incorrectly claims: "Conspicuously absent from Fletcher's decision is the acknowledgement that the AEDPA applies." Opp. 23. The fact is that the dissent found that Cooper met *both* the *Schlup* and AEDPA standards. App. 395. Judge Fletcher applied both standards because, currently, the question of which standard applies is undecided in the Ninth Circuit. App. 283-84.

The State also argues incorrectly that there is no conflict among the circuits with respect to this question. Not only do the opinions cited in Cooper's

Petition demonstrate a direct conflict among some circuits (Pet. 27-31), but they illustrate a difference in application of the standards. As this Court has made clear, a certiorari petition need not identify a "genuine conflict" between the circuits, provided it identifies a "conflict in principle" that is sufficiently important. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (certiorari granted to review Seventh Circuit ERISA preemption analysis of Illinois statute that "conflicted with the Fifth Circuit's treatment of a similar provision of Texas Law"); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998) (resolving "apparent" circuit split regarding AEDPA application to successive *Wainwright* claims).

The State's cursory discussion of the conflicting decisions highlights the differing approaches among the circuits. So does its citing cases in which this Court used a standard different from § 2244(b) when addressing cases of actual innocence. Opp. 23 (citing *Calderon v. Thompson*, 523 U.S. 538 (1998)). The State asserts that the Eleventh Circuit in *Jordan* "*merely* held that it could not ignore the enactment of the AEDPA, and therefore had to apply § 2244 to a coerced confession claim." Opp. 31 (emphasis added). In so ruling, however, the *Jordan* court reasoned that *Schlup* no longer applies to claims presenting newly discovered evidence of innocence. Pet. 28-29. Accordingly, in direct conflict with *Schlup*, the *Jordan* petitioner's new evidence of actual innocence was never considered by the court.

The State argues that "Nothing in *Jordan* conflicts with Petitioner's case, in which both the *Schlup* standard and § 2244(b) were applied to

successive petition claims." Opp. 31. The State also argues that the Third Circuit's decision in *Goldblum v. Klem*, 510 F.3d 204, 205 (3d Cir. 2007), which applied both *Schlup* and § 2244(b), is not in conflict with the present case. Opp. 31-32. This argument misses the point: the analyses in these two cases are in conflict with each other. The Ninth Circuit has not decided which standard applies, but on the same question other circuits are divergent.

Whether a circuit court has steadfastly refused to apply *Schlup* following the enactment of § 2244(b), continued to apply *Schlup* in cases of actual innocence, struggled to reconcile the two standards by meshing them together, or, as the circuit court has done in this case, posed the question but left its resolution for another day, what is painfully clear is that there is no uniform standard being applied in successive petitions presenting evidence of actual innocence.

Recently, a former member of the U.S. House of Representative Judiciary Committee who debated and voted on AEDPA wrote in an editorial:

> I can state unequivocally that [AEDPA] was not intended to preclude a claim of actual innocence based on post-sentence evidence from being considered in a habeas petition. Employing such a pinched and erroneous reading of the law to deny a condemned man the opportunity to present substantial evidence of innocence would constitute a travesty of justice in America.

Bob Barr, *Constitutional Question*, WASH. TIMES, Sept. 3, 2009, at A23. This case presents this Court

with the opportunity to resolve the issue about how and when § 2244(b) should be applied to innocence cases.

B. This Court Should Grant the Writ to Decide How to Treat Successive Petitions that Include Claims Under *Brady v. Maryland*.

The State would similarly have the circuits continue to struggle with the proper standard for *Brady* claims in successive petitions. The State cannot deny, however, that the circuits are divergent about what standard applies to *Brady* claims in successive petitions. This Court should grant certiorari "because of the importance of the question presented and the conflict of opinion on the constitutional issue involved." *Fuller v. Oregon*, 417 U.S. 40, 42 (1974).

While the Fourth and Eleventh Circuits have strictly applied the AEDPA's "clear and convincing" standard to *Brady* claims in later-filed petitions, the Ninth and Tenth Circuits have avoided AEDPA's application, instead relying on the *Brady* "reasonable probability of a different result" standard. Pet. 33-36. The courts' struggle with these different standards shows how capricious a strict application of the AEDPA can be.

The State also argues that whether "successive *Brady* claims are exempt from gateway innocence requirements was not reached below." Opp. 32. However, the key issue presented, as recognized by both *amicus curiae* briefs, is whether AEDPA has altered the "constitutional rule" established in

Brady. As highlighted by *Amicus* Innocence Network, "AEDPA's higher 'clear and convincing' standard would preclude all meaningful relief for a significant class of constitutional violations – those that meet the *Brady* standard but not AEDPA's." Innocence Network Brief 10. When material exculpatory evidence emerges after a first petition, there is an issue regarding the standard by which a court should determine if an accused's constitutional right to Due Process has been violated.

This Court should decide whether AEDPA is itself unconstitutional as applied to *Brady* claims in successive petitions. It is well-established that "Congress may not legislatively supersede [Supreme Court] decisions interpreting and applying the Constitution." Innocence Network Brief 10 (citing *Dickerson v. United States*, 530 U.S. 428, 437 (2000)). The lower court here stated that new claims in a successive petition must meet a "[r]igid [s]tandard under AEDPA." App. 90. Should courts be able to apply this rigid standard to a *Brady* constitutional claim when, through no fault of the defense, it is the government who failed to meet its ethical and constitutional obligations?

The Court should address this question not only for the important constitutional issues it raises, but also because the *Brady* violations in this case undermine Cooper's conviction. Even the state touts the importance of shoe print evidence. Opp. 3-4. The same is true as to the suppressed evidence demonstrating that the State authorized the destruction of the bloody coveralls and failed to test or disclose a bloody blue shirt recovered near the crime scene. The State successfully suppressed

material evidence for two decades. Especially in light of this newly discovered evidence, "[t]o allow the state's representatives to violate their ethical obligations and duties under *Brady* to disclose exculpatory evidence, to stall until after a first federal petition has been filed before producing such evidence, and then to penalize the defendant both for the state's transgressions and its delay violates notions of due process and fundamental fairness." CACJ and CDPA Brief 15.

CONCLUSION

Because this case presents significant questions about innocence and the standards that should be applied in successive petitions, the writ should be granted.

Respectfully submitted,

David Todd Alexander, Esq.
332 Sheridan Avenue
Peidmont, CA 94611
Telephone: (650) 387-4382
Facsimile: (510) 654-3773

Norman C. Hile
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
400 Capitol Mall
Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7900
Facsimile: (916) 329-4900

143

No. 09-363

Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

KEVIN COOPER,

Petitioner,

v.

ROBERT K. WONG, ACTING WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* CACJ AND CPDA IN SUPPORT OF PETITIONER KEVIN COOPER'S PETITION FOR WRIT OF CERTIORARI

*JOHN PHILIPSBORN
ANN C. MOORMAN
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
507 Polk Street, Ste 350
San Francisco, CA 94102
415-771-3801 (tel)
415-771-3218 (fax)
JPhilipsbo@aol.com

MICHAEL MCMAHON
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION
800 S. Victoria Avenue
HOJ-207
Ventura, CA 93009
805-477-7114 (tel)
805-648-9220 (fax)

Counsel for Amici Curiae

**Counsel of Record*

In Support of Petitioner

OCTOBER 28, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

NOTICE, CONSENT, AND INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

A. The Circuit Court Rulings Conflict in Addressing Successor Petitions that Include Claims Raised Under *Brady v. Maryland* .. 4

B. The Treatment of *Brady* Claims Raised in Successor Petitions Presents an Important and Recurring Federal Question Involving Principles of Fundamental Fairness 6

1. *Brady* Violations Occur on a Regular Basis, and Frequently Bear Directly on Fundamental Questions of Innocence 6

2. Petitioner – and Other Similarly Situated Defendants in California – Did Not Have Access to State Court Discovery to Uncover the *Brady* Violations in this Case Before Filing the First Federal Habeas Corpus Petition 13

3. AEDPA Should Not Be Interpreted to Curtain a Defendant's Rights Based on the Government's Failure to Meet Its Constitutional and Ethical Duties 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Banks v. Dretke, 540 U.S. 668 (2004).....4, 14

Berger v. United States, 295 S.Ct. 78 (1935) 15

Bracy v. Gramley, 520 U.S. 899 (1997).....14

Brady v. Maryland, 373 U.S. 83 (1963).....*passim*

Cone v. Bell, __ U.S. ___, 129 S.Ct. 1769 (2009).....14, 15

Douglas v. Workman, 560 F.3d 1156 5

Harris v. Nelson, 394 U.S. 286 (1969).....14

In re Steele, 32 Cal.4th 682, 10 Cal.Rptr.3d 536 (2004).....13

People v. Gonzales, 51 Cal.3d 1179, 800 P.2d 1159 (1990).....14

Strickler v. Greene, 527 U.S. 263 (1999).....15

Thompson v. Connick, 553 F.3d 836 (5th Cir. 2008).....11, 12

Thompson v. Connick, 578 F.3d 293 (5th Cir. 2009).....11

Tompkins v. Secretary, Department of Corrections, 557 F.3d 1257 (11th Cir. 2009).....5

United States v. Lopez, 577 F.3d 1053 (9th Cir. 2009).....4, 5

Van de Kamp v. Goldstein, ___ U.S. ___, 129 S.Ct. 855 (2009).....9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1983 9

28 U.S.C. § 2244(b)(2).....3, 4

28 U.S.C. § 2255 (h)(1) 5

Cal. Pen. Code § 1054.9(b).....13

EXECUTIVE MATERIAL

H.R. Rep. No. 104-518 (1996).....4

REPORTS

Ken Armstrong and Maurice Possley, *The Verdict: Dishonor; Trial & Error: How Prosecutors Sacrifice Justice to Win* (Pt. 1), CHI. TRIB., Jan. 10, 1999 10

California Commission on the Fair Administration of Justice, Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence (March 6, 2008), http://www.ccfaj.org/rr-pros-official.html 9, 10

Kathleen Ridolfi, California Commission on the Fair Administration of Justice, Report and Recommendations on Reporting Misconduct: Prosecutorial Misconduct: A Systemic Review (October 18, 2007), http://www.ccfaj.org/rr-pros-official.html 8, 9

TABLE OF AUTHORITIES – Continued

Page

Scheck, Neufeld & Dwyer, California Commission on the Fair Administration of Justice, Report and Recommendations on Administration of Justice: *Actual Innocence*, 2003, http://www.ccfaj.org/rr-pros-official.html 9

RULES

Sup. Ct. R. 37 2

NOTICE, CONSENT, AND INTEREST OF THE *AMICI CURIAE*[1]

California Attorneys for Criminal Justice ("CACJ") is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 2,000 members, primarily criminal defense lawyers practicing before federal and state courts. These lawyers are employed throughout the State both in the public and private sectors. CACJ has often appeared before this Court, the California Supreme Court, and the Courts of Appeal in California on issues of importance to its membership.

The California Public Defender's Association ("CPDA") is also a nonprofit California corporation. CPDA's membership of some 4,000 public defenders and lawyers in private practice makes it an important voice of the criminal defense bar. CPDA

---

[1] The undersigned, as chairs of the *amicus* committee of CACJ of the *amicus* committee of CPDA, certify to this Court that no counsel for a party authored this brief in whole or in part, and no party to this litigation or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Written consent was granted, and is filed herewith.

provides continuing legal education for defense lawyers, and has been recognized as a provider of such education for almost 40 years. CPDA also regular appears as *amicus curiae* in matters of importance to its membership, and has appeared in that capacity in this Court on numerous occasions.

Petitioner's case permits this Court to provide the lower courts with guidance as to the legal standard that applies to a *Brady* claim raised in a successor habeas corpus petition when the state has withheld information supporting that claim, and the claim would have been meritorious had the information been disclosed prior to petitioner's filing of an initial habeas corpus petition. CACJ's and CPDA's members have an interest in the issues raised in this case, which arise frequently and implicate the fundamental rights of the criminal defendants whom their members regularly represent.

The Innocence Project provided notice to counsel of record under Rule 37 of the Supreme Court Rules of the intent to file an *amicus* brief. Thereafter, CACJ requested further consent from the Attorney General of California to file a separate brief, which is intended to allow CACJ and CPDA to express the interest of the California criminal defense bar in this matter.

SUMMARY OF ARGUMENT

The circuit and district courts would benefit from this Court's guidance in addressing successor petitions with claims raised under *Brady v. Maryland*, 373 U.S. 83 (1963). There is a conflict in the circuits on the issue of whether an exception to 28 U.S.C. § 2244(b)(2) should exist for *Brady* violations. This conflict requires resolution because *Brady* violations – which often bear on questions of innocence – continue to be widespread. Petitioner, and others similarly situated, did not have access to state court discovery to assist him in ferreting out the multiple *Brady* violations that occurred in this case. The state should not be permitted to benefit under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") from its own misconduct in withholding material, exculpatory evidence.

ARGUMENT

Certiorari should be granted so lower courts may obtain the Court's guidance on the critical issue of what legal standard applies to a *Brady* claim raised in a successor habeas corpus petition, when the state has withheld information supporting that claim and the claim would have been meritorious had the information been disclosed prior to petitioner's filing an initial habeas corpus petition.

A. The Circuit Court Rulings Conflict in Addressing Successor Petitions that Include Claims Raised Under *Brady v. Maryland*

The purpose of AEDPA's successor petition provisions was to sanction lack of diligence by the defense. *See* H.R. Rep. No. 104-518, at 111 (1996) (AEDPA was enacted to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of *unnecessary* delay and abuse in capital cases.") (Emphasis supplied.) This purpose is not served when the defendant is sanctioned for the failure by the *state* to comply with its constitutional obligations under *Brady*, though that is the very effect of a strict application of § 2244(b)(2) to *Brady* claims raised in successor petitions. 28 U.S.C. § 2244(b)(2) requires such a petitioner to demonstrate there is "clear and convincing" evidence that but for the *Brady* violation, "no reasonable factfinder would have found the applicant guilty of the underlying offense." This standard is far more onerous than the standard for a *Brady* claim in an initial petition. *See Banks v. Dretke*, 540 U.S. 668, 699 (2004) (habeas corpus petitioner is entitled to relief where there is a "reasonable probability of a different result" had exculpatory evidence the state failed to disclose been available at trial).

Recognizing the unfairness inherent in applying a higher standard to *Brady* claims in successor petitions – in essence, penalizing the defendant for misconduct by the state – some courts have suggested an exception to § 2244(b)(2) should apply to *Brady* violations. *See, e.g., United States v. Lopez*, 577 F.3d

1053, 1064 (9th Cir. 2009);[2] *Douglas v. Workman*, 560 F.3d 1156, 1187 (10th Cir. 2009).[3] Others have not recognized the need for such an exception. *See, e.g.*, *Tompkins v. Secretary, Department of Corrections*, 557

---

[2] In *Lopez*, the Ninth Circuit considered the application of § 2255(h)(1), a provision analogous to § 2244(b)(2), to *Brady* claims raised in successor petitions. The Ninth Circuit observed:

> Given the nature of *Brady* claims, petitioners often may not be at fault for failing to raise the claim in their first habeas petition. It is the prosecutor who violates *Brady*'s disclosure obligations by not providing favorable evidence to the defense, and that prosecutorial error may not surface until petitioner's first habeas petition has already been resolved.

Lopez, 577 F.3d at 1064. The Ninth Circuit further noted:

> If § 2255(h) applies literally to every second-in-time *Brady* claim, federal courts would be unable to resolve an entire subset of meritorious *Brady* claims: those where petitioner can show the suppressed evidence establishes a *reasonable probability* of a different result and is therefore material under *Brady*, but cannot, under § 2255(h)(1)'s more demanding prejudice standard, show that the evidence establishes by *clear and convincing evidence* that no reasonable juror would have voted to convict petitioner.

Id., emphasis in original. Without deciding the issue, the Ninth Circuit concluded the petitioner in *Lopez* had not met the materiality requirement for his *Brady* claims. *Id.* at 1066.

[3] In *Douglas*, the Tenth Circuit, recognizing the unfairness of the application of § 2244(b) to a petitioner who, through "no fault of his own," had been unable to include a *Brady* claim in his first petition, upheld the district court's decision to treat Douglas's *Brady* claim as a supplement to his initial petition, rather than as a claim in a successor petition. *Id.* at 1171, 1187.

F.3d 1257, 1260 (11th Cir. 2009). As a result, there is a split in the circuits.

This Court should grant certiorari to provide definitive guidance to the lower courts in the proper standard to apply to *Brady* claims in successor petitions.

B. The Treatment of *Brady* Claims Raised in Successor Petitions Presents an Important and Recurring Federal Question Involving Principles of Fundamental Fairness

In addition to dividing the circuit courts on how to treat *Brady* claims raised in successor petitions, this issue also raises a question of fundamental fairness affecting criminal defendants, prosecution offices, and law enforcement agencies throughout the country: should the state be rewarded – and criminal defendants punished – for deliberate, or negligent, withholding of material exculpatory evidence until after a first federal habeas corpus petition has been filed?

1. *Brady* Violations Occur on a Regular Basis, and Frequently Bear Directly on Fundamental Questions of Innocence

The questions presented here would be less compelling if the withholding of relevant exculpatory evidence were a rarity. However, there is reliable, and compelling, evidence that *Brady* violations are disturbingly common. The California Commission on the

Fair Administration of Justice, a non-partisan commission created by the California Senate to study the California criminal justice system (the "Commission"),[4] recently solicited a study of the problem:

> The Commission asked its researchers to analyze every reported appellate decision in California, whether published or unpublished, where the Courts addressed a claim of prosecutorial misconduct or defense lawyer incompetence for the ten year period ending in 2006. . . .
>
> Professor Cookie [Kathleen] Ridolfi of Santa Clara University School of Law located 2,130 California cases in which claims

---

[4] The Commission was created by Senate Resolution No. 44 of the 2003-04 Session of the California State Senate, adopted on August 27, 2004. Senate Resolution 44 provided, in part, that the Commission would have the following duties:

> (1) To study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons.
>
> (2) To examine ways of providing safeguards and making improvements in the way the criminal justice system functions.
>
> (3) To make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate.

Senate Resolution No. 44 (Cal. 2004). The Commission consisted of members involved in criminal prosecution, defense, and adjudication. *See* http://www.ccfaj.org/membership.html.

> of prosecutorial misconduct were raised. Courts concluded that prosecutorial misconduct did occur in 443 of these cases, or 21%. In 390 of these cases, however, the court concluded the misconduct was harmless error and affirmed the conviction. In 53 cases, the misconduct resulted in a reversal of the conviction. *The most common forms of misconduct found were failing to disclose exculpatory evidence and improper argument.* Ridolfi, Prosecutorial Misconduct: A Systemic Review.

California Commission on the Fair Administration of Justice, Report and Recommendations on Reporting Misconduct at 2-3 (Oct. 18, 2007), http://www.ccfaj.org/rr-pros-official.html (follow California Commission on the Fair Administration of Justice: Final Report and Recommendations on Reporting Misconduct hyperlink) (emphasis added). Professor Ridolfi found that of the 443 cases in which prosecutorial misconduct did occur, 129 involved *Brady* violations. Kathleen Ridolfi, Prosecutorial Misconduct: A Systemic Review at 9, http://www.cpda.org/publicarea/CCFAJ/Professional-Responsibility-DAs-and-Defenders/CCFAJ-Official-Reports-Professional-Responsibility-of-Prosecutors-and-Defenders.html (follow Prosecutorial Misconduct – A Systemic Review Prof. Cookie Ridolfi, Santa Clara University School of Law Download Study hyperlink).

The Commission further noted that both prosecutorial misconduct and defense lawyer ineffective representation "have been identified among the leading causes of wrongful convictions. A study of the first 74 DNA exonerations in the United States found that

prosecutorial misconduct was a factor in 45% of the cases. . . ." California Commission on the Fair Administration of Justice, Report and Recommendations on Reporting Misconduct at 3, n.1. (Emphasis added, citing Scheck, Neufeld & Dwyer, *Actual Innocence*, 365 (2003).)

Despite these multiple instances of misconduct, prosecutors are rarely reported to the State Bar, leaving open the question of the extent to which prosecutors committing *Brady* violations in California face any repercussions. California Commission on the Fair Administration of Justice, Report and Recommendations on Reporting Misconduct at 4-6; *cf., Van de Kamp v. Goldstein*, ___ U.S. ___, 129 S.Ct. 855 (2009) (prosecutors are absolutely immune from liability under 28 U.S.C. § 1983 for alleged general failures in supervision, training, and information-system management – even if they resulted in a *Brady* violation instrumental in plaintiff's wrongful conviction for murder).

In an attempt to address continuing, widespread *Brady* violations in California, the Commission made several recommendations regarding the establishment of district attorney and law enforcement agency policies and training governing *Brady* compliance. *See* California Commission on the Fair Administration of Justice, Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence at 15-17 (March 6, 2008), http://www.ccfaj.org/rr-pros-official.html (follow California Commission on the Fair Administration of Justice:

Final Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence hyperlink).

The California Commission on the Fair Administration of Justice was chaired by a former Attorney General of California, and included a wide range of representatives of the components of California's criminal justice processes, including the current Attorney General of California, a member of the Federal judiciary, Police Department Chiefs, District Attorneys, Defenders, academics, and others. The Commission heard from a wide variety of witnesses, and collected numerous publications and materials relevant to its work. Its findings were published in a *Final Report*, where the subject of the breadth of disclosures necessary to the fair administration of justice was discussed from several perspectives, from specific subject matters such as eyewitness identification to the professional responsibilities of lawyers involved in the criminal courts.

Brady violations, along with failures by the state to adequately protect against them, are not infrequent throughout the United States. *See* Ken Armstrong and Maurice Possley, *The Verdict: Dishonor; Trial & Error: How Prosecutors Sacrifice Justice to Win* (Pt. 1), CHI. TRIB., Jan. 10, 1999, at 1C (Investigative reporters Ken Armstrong and Maurice Possley reviewed court records, appellate rulings, and lawyer disciplinary records in cases across the country and found that between 1963 and 1999 at least 381 defendants had a homicide conviction overturned

because prosecutors concealed evidence of innocence or presented evidence they knew to be false).

Indeed, members of CACJ and CPDA have frequently encountered prosecutorial failures to disclose material evidence favorable to the defense. Sometimes the errors have been inadvertent; the prosecutor was not aware that the undisclosed document was in the possession of some law enforcement agency. However, on other occasions the evidence demonstrated the intentional suppression of evidence the prosecutor knew, or reasonably should have known, would be beneficial to the defense. Either permutation results in a distortion of the truth-finding function of the trial courts. Such misconduct may not come to light for many years, and it may come to light as the result of fortuity. *Amici* respectfully submit that the legal system supervised by this Court must have the opportunity to correct the wrong that has been done. It would be intolerable for the system to erect procedural obstacles so high that a wronged defendant is thereby precluded from obtaining the relief to which he or she should be entitled.

Recently, in *Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009), the Fifth Circuit affirmed a $14 million jury verdict against the Orleans Parish District Attorney's Office and its former District Attorney for their "deliberate indifference" to the need to train prosecutors to comply with the dictates of *Brady*. As reported in the vacated panel opinion, *Thompson v. Connick*, 553 F.3d 836 (5th Cir. 2008), in 1985 the

suppression of exculpatory blood evidence led to plaintiff's conviction in an attempted robbery case, a wrongful conviction that kept him from testifying in his capital trial a few weeks later. After the *Brady* error came to light in 1999 and plaintiff's innocence in the attempted robbery was proved, the capital conviction was reversed in 2002. Plaintiff was retried for murder and acquitted. *Id.* at 843-846. Plaintiff was imprisoned for eighteen years, fourteen in solitary confinement on death row at Angola Prison, where he "spent twenty-three hours a day in a six-by-nine-foot cell with no windows or air conditioning"; he had six execution dates and came within one month of being executed; and the jury that ultimately acquitted him did so after deliberating only 35 minutes. *Id.* at 846, 865.

As illustrated by the egregious details of the *Thompson* case, *Brady* materials frequently bear directly on fundamental questions of innocence. At a time when there are continued concerns about the unreliability of death judgments and the possibility of executing innocent defendants, imposing an artificial and unreasonable barrier to pursuing the truth regarding the defendant's alleged offense and conviction is contrary to the intent of the AEDPA and a violation of constitutional due process.

2. Petitioner – and Other Similarly Situated Defendants in California – Did Not Have Access to State Court Discovery to Uncover the *Brady* Violations in this Case Before Filing the First Federal Habeas Corpus Petition

Petitioner, and others like him, had no access to state court discovery at the time that he litigated his state habeas corpus petition. Discovery in connection with California state post-conviction petitions did not become available as a matter of California procedural law until January 1, 2003, when California Penal Code § 1054.9 became effective. This statute provides for limited post-conviction discovery in cases involving sentences of death or life without the possibility of parole. In certain circumstances the statute allows such defendants access to "discovery materials" which are defined as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." Cal. Pen. Code § 1054.9(b).

The California Supreme Court clarified the extent of discovery under § 1054.9 in its opinion in *In re Steele*, 32 Cal.4th 682, 10 Cal.Rptr.3d 536 (2004), issued on March 3, 2004.

Thus, petitioner – and others like him who filed state habeas corpus petitions before the enactment of § 1054.9 and the decision in *Steele* – had *no* means of compelling discovery in state post-conviction proceedings. Such petitioners therefore had no reliable access in California state courts, as a matter of

discovery rights, to evidence of *Brady* violations. *People v. Gonzales*, 51 Cal.3d 1179, 1260-1261, 800 P. 2d 1159 (1990).

Nor is such discovery automatically available in federal court. Without "good cause" to request it, the federal habeas corpus petitioner is not permitted access to discovery. *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997) (petitioner must raise "specific allegations" to support his claims for relief before he is entitled to discovery in habeas corpus proceedings, quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

The defense should not be precluded from raising a *Brady* claim in a successor petition based upon undisclosed information of which the defense was unaware, and which the prosecution failed to disclose pre-trial and could not be compelled to disclose in state or federal post-conviction proceedings. As this Court has observed, "[a] rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696.

3. AEDPA Should Not Be Interpreted to Curtail a Defendant's Rights Based on the Government's Failure to Meet Its Constitutional and Ethical Duties

In *Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769 (2009), this Court granted penalty relief on a *Brady* claim, reiterating the prosecutor's constitutional and ethical duties and again holding it is the state's "duty

to refrain from improper methods calculated to produce a wrongful conviction." *Cone*, 129 S.Ct. at 1782 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). As the Court further observed, "the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." *Cone*, 129 S.Ct. at 1783 n.15 (citing, *inter alia*, ABA Model Rule of Professional Conduct 3.8(d) (2008)). The Court concluded, "[a]s we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone*, 129 S.Ct. at 1783 n.15.

To allow the state's representatives to violate their ethical obligations and duties under *Brady* to disclose exculpatory evidence, to stall until after a first federal petition has been filed before producing such evidence, and then to penalize the defendant both for the state's transgressions and its delay, violates notions of due process and fundamental fairness, which ought to be the driving principle here as it was in *Strickler v. Greene*, 527 U.S. 263 (1999), where the Court held, pre-AEDPA, that the *Brady* violation itself established cause for petitioner's failure to raise his *Brady* claim prior to pursuing federal habeas corpus relief.

CONCLUSION

Certiorari should be granted to provide the lower courts with guidance on the critical and recurring issue of the standard to be applied to *Brady* violations raised in successor habeas corpus petitions, where the *Brady* material is not disclosed by the state until after an initial habeas corpus petition has been filed.

Respectfully submitted,

*JOHN PHILIPSBORN
ANN C. MOORMAN
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
507 Polk Street, Ste 350
San Francisco, CA 94102
415-771-3801 (tel)
415-771-3218 (fax)
JPhilipsbo@aol.com

MICHAEL MCMAHON
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION
800 S. Victoria Avenue
HOJ-207
Ventura, CA 93009
805-477-7114 (tel)
805-648-9220 (fax)

Counsel for Amici Curiae

**Counsel of Record*

In Support of Petitioner

OCTOBER 28, 2009

No. 09-363

Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

KEVIN COOPER,

Petitioner,

v.

ROBERT K. WONG, ACTING WARDEN, SAN QUENTIN STATE PRISON, SAN QUENTIN, CALIFORNIA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Keith A. Findley
President
INNOCENCE NETWORK
University of Wisconsin
Law School
975 Bascom Mall
4318H Law
Madison, WI 53706
(608) 262-4763

Matthew D. Powers
Counsel of Record
Aaron Y. Huang
Christy M. Von der Ahe
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3000

Calvin Y. Cheng
WEIL, GOTSHAL & MANGES LLP
700 Louisiana, Suite 1600
Houston, TX 77002
(713) 546-5000

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Does the bar on "second or successive" habeas petitions in 28 U.S.C. § 2244(b)(2)(B) apply to due process claims under *Brady v. Maryland*, 373 U.S. 83 (1963), based on the state's suppression or non-disclosure of material evidence, where the petitioner had no way of discovering the factual basis of the claim until after filing a previous federal petition?

2. If newly-discovered *Brady* claims can be considered successive, does the heightened burden of proof imposed by § 2244(b)(2)(B)(ii) have the unconstitutional effect of legislatively overruling this Court's interpretation of the 14th Amendment's Due Process Clause?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
INTEREST OF *AMICUS CURIAE* 1
STATEMENT OF THE CASE 3
SUMMARY OF ARGUMENT 5
ARGUMENT 8
A. This Court Should Hold That AEDPA § 2244(b)(2)(B) Does Not Supersede This Court's *Brady* Constitutional Standard. 8
1. *Brady*'s Standard Cannot be Superseded By AEDPA. 9
2. Application of the AEDPA Standard Would Bar Remedy for a Class of Unconstitutional *Brady* Violations. 12
3. This Court can Avoid Constitutional Issues By Interpreting § 2244(b)(2) Not to Apply to Newly-Found Brady Claims. 16

TABLE OF CONTENTS

Page

B. This Court Should Grant the Petition to Resolve a Circuit Split Regarding the Standard of Review Applicable to a Successive Habeas Petition That Raises a Newly-Found *Brady* Claim. 18

1. The Ninth and Tenth Circuits Have Not Strictly Applied the AEDPA Standard to Successive Habeas Petitions Raising Newly-Found *Brady* claims..... 19

2. The Fourth and Eleventh Circuits Have Applied the AEDPA Standard to Successive Habeas Petitions Raising Newly-Found *Brady* claims..... 21

3. Application of the AEDPA Standard of Review is Also Inconsistent with *Holland v. Jackson* and Related Circuit Decisions. 22

C. This Court Should Grant the Petition to Clarify the Standard for Evaluating Newly-Found *Brady* Claims in Successive Petitions in Light of the Unjust Practical Implications for Habeas Practice and Policy of Applying § 2244(b)(2)(B)'s Heightened Standard. 24

CONCLUSION 25

TABLE OF CONTENTS

Page

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Banks v. Dretke,
540 U.S. 668 (2004) 5, 10, 14

Brady v. Maryland,
373 U.S. 83 (1963) ..... passim

Castro v. United States,
540 U.S. 375 (2003) 13

City of Boerne v. Flores,
521 U.S. 507 (1997) 10, 11, 12

Cooper v. Aaron,
358 U.S. 1 (1958) 10

Cooper v. Brown,
510 F.3d 870 (9th Cir. 2007) 4

Cooper v. Brown,
565 F.3d 581 (9th Cir. 2009) 2, 3, 4

Cooper v. Woodford,
357 F.3d 1019 (9th Cir. 2004) 4

Crowell v. Benson,
285 U.S. 22 (1932) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

Dickerson v. United States,
530 U.S. 428 (2000) 10, 11

Douglas v. Workman,
560 F.3d 1156 (10th Cir. 2009) 18, 20, 24

Evans v. Smith,
220 F.3d 306 (4th Cir. 2000) 18, 21

Felker v. Turpin,
518 U.S. 651 (1996) 13

Ford v. Wainwright,
477 U.S. 399 (1986) 17

Holland v. Jackson,
542 U.S. 649 (2004) 22, 23

In re Davis,
557 U.S. ____ (2009) 15

Joseph v. Coyle,
469 F.3d 441 (6th Cir. 2006) 22, 23

Killian v. Poole,
282 F.3d 1204 (9th Cir. 2002) 23

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Miller-El v. Cockrell,
537 U.S. 322 (2003) 24

Miranda v. Arizona,
384 U.S. 436 (1966) 11

Monroe v. Angelone,
323 F.3d 286 (4th Cir. 2003) 22

Panetti v. Quarterman,
551 U.S. 930 (2007) ..... passim

People v. Cooper,
809 P.2d 865 (Cal. 1991) 4

Rhines v. Weber,
544 U.S. 269 (2005) 25

Schlup v. Delo,
513 U.S. 298 (1995) 8, 13

Strickler v. Greene,
527 U.S. 263 (1999) 8, 13

Tompkins v. Sec'y, Dep't Corr.,
557 F.3d 1257 (11th Cir. 2009) 18, 21

Triestman v. United States,
24 F.3d 361 (2d Cir. 1997) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Agurs,
427 U.S. 97 (1976) 8

United States v. Bagley,
473 U.S. 667 (1985) 6, 8

United States v. Lopez,
577 F.3d 1053 (9th Cir. 2009) 17, 18, 19, 20

Williams v. Coyle,
260 F.3d 684 (6th Cir. 2001) 23

Statutes

28 U.S.C. § 2244(b)(2) ..... passim

28 U.S.C. § 2254 17

Other Authorities

H.R. Rep. No. 104-518, at 111
(1996) 24

INTEREST OF *AMICUS CURIAE*

The Innocence Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The fifty-two current members of the Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[2] The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Innocence Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

In this case, the Innocence Network seeks to present a practical perspective on the issues raised in the hope that future wrongful convictions will be

---

[1] The parties have consented to the filing of this brief. Their consent letters have been filed with the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The member entities are listed in the appendix.

minimized. The Innocence Network has found that, unfortunately, prosecutors do not always give the complete set of facts to juries and defendants. Juries have voted to convict because they were unaware of material exculpatory evidence. Innocent defendants have spent time in jail because they were unable to present their full case. This is a tragedy that should be avoided whenever possible. When a prisoner raises a claim that a prosecutor, in violation of both constitutional and ethical obligations, has suppressed or failed to disclose material evidence, that claim should be heard.

This petition presents the question of whether a newly-found *Brady* claim raised in a successive federal petition for habeas corpus should suffer a harsher burden of proof than a *Brady* claim raised in a first petition. The answer is no.

Kevin Cooper's case presents a perfect example of the injustice that would result from applying a harsher burden of proof. In this case, the prosecutor failed to disclose and destroyed at least three pieces of exculpatory evidence. *See Cooper v. Brown*, 565 F.3d 581, 620-29 (9th Cir. 2009) (Fletcher, J., dissenting). This evidence was not presented to the jury. Further, because of the prosecutor's suppression, the evidence was not discovered until after Mr. Cooper's first federal habeas petition had been filed. *Id.* Now, Mr. Cooper is in danger of being executed despite the existence of newly-found exculpatory evidence.

STATEMENT OF THE CASE

In May 1985, a jury convicted Kevin Cooper of the 1983 murders of Doug and Peggy Ryen, their daughter Jessica, and their houseguest Chris Hughes. That conviction was tainted by prosecutorial misconduct which denied the jury the ability to evaluate significant evidence that could have led to finding Mr. Cooper innocent.

At least three pieces of evidence suppressed by the prosecution could have been exculpatory: First, a prison warden had specifically contacted investigators with information indicating that bloody shoeprints left at the scene were from shoes that were not issued by Mr. Cooper's prison but could be obtained commonly. *See Cooper v. Brown*, 565 F.3d 581, 620-25 (9th Cir. 2009). Yet, the prosecution not only failed to disclose this information to defense counsel but knowingly presented testimony to the contrary. Second, investigators were given the bloody coveralls of a different suspect, and his girlfriend provided information that suggested he may have committed the crime instead. *See id.* at 625-27. A deputy destroyed the coveralls without first telling defense counsel, and the prosecution failed to disclose the report which suggests that, contrary to the deputy's testimony at trial, his superior officer had approved this action. Third, investigators recovered a bloody shirt near the crime scene. *See id.* at 627-29. The state's log indicates that this shirt corroborated witness testimony suggesting that the crime was committed by multiple other individuals. Once more, the jury was never given the opportunity to examine this

exculpatory evidence, because the prosecution disclosed neither the log nor the shirt to the defense.

The California State Supreme Court affirmed Mr. Cooper's conviction in 1991. *People v. Cooper*, 809 P.2d 865 (Cal. 1991). Mr. Cooper's first federal petition for habeas corpus was denied in 1997. His second federal petition was denied in 1998, and the denial was affirmed on appeal in 2002. In February 2002, Mr. Cooper filed an application to the Ninth Circuit requesting permission to file a successor habeas petition based on significant new *Brady* evidence. The Ninth Circuit granted the request. *Cooper v. Woodford*, 357 F.3d 1019 (9th Cir. 2004). The district court denied that successor petition. *Cooper v. Brown*, No. CV-04-00656-H (S.D. Cal. May 27, 2005) (Huff, C.J.) (Order Denying Successive Petition for Writ of Habeas Corpus). A three judge panel of the Ninth Circuit affirmed the district court's denial of the successor petition. *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007). On May 11, 2009 the Ninth Circuit denied rehearing. *Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009). Eleven circuit judges dissented to the denial of rehearing.

In his dissent to the Ninth Circuit's denial of rehearing, Judge Fletcher found that the State violated *Brady* in several respects by failing to disclose the exculpatory evidence listed above. *Id.* at 620-29. Cooper had no knowledge of any of this suppressed exculpatory evidence until 2004, well after Cooper's first habeas petition was filed. *See id.*

Because of these *Brady* violations, the defense did not have all the information to which it was

entitled. Had this critical evidence been provided to the defense, a jury could have easily found Cooper innocent. According to the petition, after the jury deliberation, one juror stated that if there had been one less piece of evidence against Cooper, the jury would not have voted to convict. (Petition at 16.)

SUMMARY OF ARGUMENT

This Court should grant the petition for writ of certiorari in Kevin Cooper's case to resolve the burden of proof required for claims of constitutional error under *Brady v. Maryland*, 373 U.S. 83 (1963), that are discovered and raised, for the first time, after a first habeas application has been filed.

In this case, the District Court and the Ninth Circuit applied the burden of proof stated in 28 U.S.C. § 2244(b)(2)(B)(ii) to Cooper's successive habeas petition involving *Brady* claims. This was a mistake. The correct burden of proof for newly-found *Brady* claims is that set forth in *Brady*, regardless of whether the *Brady* claim is raised in a first or successive habeas petition.

In *Brady* and its progeny, this Court held that a prosecution's suppression or failure to disclose material evidence violates constitutional requirements of due process and, despite procedural defaults, may qualify for federal court relief if there is a "reasonable probability of a different result" if the suppressed evidence had been disclosed to the defense. *E.g.*, *Banks v. Dretke*, 540 U.S. 668, 699 (2004). This is based on the Court's concern that justice should be done. *Cf. United States v. Bagley*,

473 U.S. 667, 675 (1985). Where material exculpatory evidence is withheld, meritorious *Brady* claims go to the core question of innocence or guilt and determine whether someone who is potentially innocent will have his claim fairly and constitutionally reviewed.

However, in 1996 Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), including 28 U.S.C. § 2244(b)(2)(B) which provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[3]

---

[3] This brief addresses the issues presented by the second requirement, as the first ("could not have been discovered previously through the exercise of due diligence") is presumably satisfied in all newly-found *Brady* claims: *Brady* evidence, by definition, is suppressed, and could not have been discovered with due diligence.

It is unclear whether § 2244(b)(2)(B) purports to apply to newly-found *Brady* claims, and separate Circuit Courts have resolved this question differently. Application of AEDPA would create constitutional questions, as *Brady* is a constitutional requirement that cannot be superseded by a legislative act, and AEDPA's higher "clear and convincing" standard would preclude all meaningful relief for a significant class of constitutional violations — those that meet the *Brady* standard but not AEDPA's. In so doing, it would also create harmful and unjust consequences for habeas practice, contrary to AEDPA's intended purpose, by encouraging the state to continue to hide suppressed evidence and, in response, petitioners to file speculative or unripe claims.

Kevin Cooper's case thus presents this Court with an excellent opportunity to affirm that a *Brady* claim raised for the first time in a later habeas petition should be evaluated according to the Court's "reasonable probability of a different result" standard rather than Congress's "clear and convincing evidence" and "no reasonable factfinder" standard according to a literal reading of 28 U.S.C. § 2244(b)(2)(B). In so doing, the Court can resolve the conflict amongst the Circuits, restore the constitutional standard intended by *Brady*, and provide for more just and sensible habeas practice.

ARGUMENT

A. This Court Should Hold That AEDPA § 2244(b)(2)(B) Does Not Supersede This Court's *Brady* Constitutional Standard.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. The prosecution's duty to disclose thus exists even if there has been no request by the accused, and the duty encompasses impeachment evidence as well as exculpatory evidence. *E.g.*, *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *Bagley*, 473 U.S. at 676; *United States v. Agurs*, 427 U.S. 97, 107 (1976)). Where, as in Kevin Cooper's case, the suppressed evidence is both material and exculpatory, the underlying concern is one of innocence, as "a court cannot have confidence in the outcome of the trial." *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Accordingly, a successful claim under *Brady* requires the petitioner to show a "reasonable probability of a different result" if the evidence had been available at trial. *See Banks*, 540 U.S. at 699. By contrast, AEDPA requires a "second or successive" federal habeas petition to show "by clear and convincing evidence" that no reasonable

factfinder having all the facts would have found the applicant guilty. 28 U.S.C. § 2244(b)(2)(B)(ii). The unyielding application of AEDPA's "clear and convincing evidence" standard, in lieu of the "reasonable probability of a different result" standard from *Brady* and its progeny, to newly-found *Brady* claims raises constitutional problems that the Circuit Courts — and the District Court in this case — have failed to address adequately.

This Court's decision in *Brady* announced a constitutional standard for finding a due process violation. This means that any court applying the § 2244(b)(2)(B)(ii) standard instead has implicitly held that a legislative act supercedes this Court's constitutional rule. More alarmingly for habeas practice, courts applying the higher AEDPA standard would effectively deny remedy to due process violations sufficiently material and prejudicial to violate the Constitution, per *Brady*, yet unable to meet the higher threshold requirement of § 2244(b)(2)(B)(ii). This Court should grant certiorari in this case to interpret § 2244(b)(2)(B) in a way that resolves these constitutional problems.

1. *Brady*'s Standard Cannot be Superseded By AEDPA.

In *Brady*, this Court did not merely interpret federal law, but stated a "constitutional rule": "[S]uppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. . . . [T]wo decisions from the Third Circuit Court of Appeals . . . state the correct constitutional rule." *Brady*, 373 U.S. at 86 (citations

omitted). This Court reaffirmed this as recently as 2004. *See Banks*, 540 U.S. at 691 ("*Brady*, we reiterate, held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process . . . .'" (quoting *Brady*, 373 U.S. at 87)). The "reasonable probability of a different result" standard from the *Brady* line of cases thus arises from and embodies the Court's interpretation of the Constitution.

If AEDPA's heightened "clear and convincing evidence" standard were made applicable to all later-filed *Brady* claims, it would in effect narrow this Court's interpretation of the Fourteenth Amendment.

However, it has been well established that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000); *see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."))).

For example, in *Dickerson v. United States*, this Court held that *Miranda v. Arizona*, 384 U.S. 436 (1966), "announced a constitutional rule that

Congress may not supersede legislatively," because *Miranda* had "laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow'" that protect a suspect's Fifth Amendment rights. *Dickerson*, 530 U.S. at 435 (quoting *Miranda*, 384 U.S. at 442). Congress could not enact a statute two years later that altered or dispensed with those constitutional guidelines.

In *City of Boerne v. Flores*, the Court rejected Congress's attempt to change the standard that courts apply in challenges under the Free Exercise Clause of the First Amendment. The Court declared that, even though Congress is granted the power "to enforce" under § 5 of the Fourteenth Amendment, "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*, 521 U.S. at 519. "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" *Id.* at 529.

This Court has laid down a constitutional guideline — the "reasonable probability of a different result" standard — for determining when suppression of evidence constitutes a due process constitutional violation, and Congress cannot, through the legislative act AEDPA, supersede the Court's determination. As a result, the *Brady* precedents should continue to apply:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

Id. at 536. The lower court's apparent application of AEDPA's "clear and convincing" standard to evaluate the petitioner's *Brady* claims in this case thus presents an opportunity for this Court to correct and clarify this constitutional problem.

2. Application of the AEDPA Standard Would Bar Remedy for a Class of Unconstitutional *Brady* Violations.

There can be no doubt that the "clear and convincing evidence" standard under § 2244(b)(2)(B)(ii) imposes a higher burden of proof than a "reasonable probability of a different result" under *Brady* — and as a result, there exists a subset of claims that meets (or exceeds) the *Brady* standard but cannot meet the § 2244(b)(2)(B)(ii) requirement. Thus, if § 2244(b)(2)(B) were made applicable to all successive habeas petitions involving *Brady* claims, there would be prosecutorial misconduct that, according to this Court's interpretation of the Fourteenth Amendment, is squarely

unconstitutional but that, according to § 2244(b)(2)(B), is barred from review.[4]

Barring all review of constitutional violations presents serious constitutional concerns. This Court has previously avoided interpretations of AEDPA that "would close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Castro v. United States*, 540 U.S. 375, 381 (2003) (citing *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996)). It has sought to ensure that petitioners are still provided "a meaningful avenue to avoid manifest injustice." *Schlup*, 513 U.S. at 327; *cf. Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). Indeed, in applying *Brady*, this Court has resolutely refused to impose the type of due diligence on the petitioner that would be required by § 2244(b)(2)(B) as being fundamentally incompatible with constitutional due process:

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis

---

[4] As discussed in Part C, this is not a remote hypothetical — a heightened standard of proof would not only create a constitutional concern but, as in *Panetti*, would also have serious implications for habeas practice and directly affect the outcomes of real cases, including this case.

> of mere suspicion that some prosecutorial misstep may have occurred." The "cause" inquiry, we have also observed, turns on events or circumstances "external to the defense."
>
> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.

Banks, 540 U.S. at 695-96 (internal citations omitted; alterations in original); *cf. Triestman v.*

United States, 124 F. 3d 361, 377–80 (2d Cir. 1997) ("[S]erious due process questions would arise if Congress were to close off all avenues of redress in such cases, especially when the prisoner could not have raised his claim of innocence — which appears on the record — in an effective fashion at an earlier time."), *cited by In re Davis*, 557 U.S. ___ (2009) (Steven, J., concurring).

§ 2244(b)(2)(B), interpreted strictly, would close off all meaningful avenues of redress and thus create a serious problem of constitutional due process. Because the delay which results in the deprivation is not the result of any shortcoming on the part of the petitioner but rather the state opposing him, § 2244(b)(2)(B) further exacerbates the constitutional problem by creating a perverse incentive for the state to further violate constitutional rights by continuing to suppress evidence until after the first petition has been filed. In order to avoid this pitfall, the petitioner then has the impossible burden of stating in his first petition what has been specifically hidden from him — that is, he must perform hide-and-seek "due diligence" or file speculative or unripe claims.[5] As suggested by *Banks*, such a system cannot possibly comport with even the most basic notions of constitutional due process.

---

[5] *Brady* may thus be distinguishable from other constitutional cases because *Brady* violations cannot be discovered through due diligence.

3. This Court Can Avoid Constitutional Issues By Interpreting § 2244(b)(2) Not to Apply to Newly-Found Brady Claims.

This Court may avoid these constitutional questions by interpreting AEDPA as inapplicable to newly-discovered *Brady* claims. It is a "cardinal principle" of statutory construction that, if a statute remains ambiguous, it should be interpreted in the manner that avoids constitutional issues. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

Such an ambiguity is present in the statute in question in the present case: Namely, it is unclear whether a newly-found *Brady* claim constitutes a "second or successive" petition within the ambit of § 2244(b)(2) because, as a result of prosecutorial misconduct, the claim could not have been brought any earlier. The Court has already noted, while interpreting the phrase in *Panetti v. Quarterman*, that the meaning of "second or successive" in § 2244(b)(2) is not strictly limited and takes into account pre-AEDPA case law:

> The phrase "second or successive" is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of [AEDPA]. The Court has declined to interpret

> "second or successive" as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application.

551 U.S. at 943-44 (citations omitted). In *Panetti*, the Court declared that the statutory bar on "second or successive" applications did not apply to an incompetent-to-be-executed claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), brought in an application filed when the claim "is first ripe." *Id.* at 947. Because a *Ford* claim is based on a petitioner's condition at the time of execution, the claim is not "ripe" if there is no early sign of illness within the one-year period for filing a first petition. In arriving at this interpretation of AEDPA, the Court considered the practical effects "when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Id.* at 946-47.

Similar arguments have been made in the Circuit Courts for also exempting *Brady* claims. *Cf. United States v. Lopez*, 577 F.3d 1053, 1056 (9th Cir. 2009). A petitioner's as-yet-undiscovered *Brady* claim is not "ripe" because, as a result of the prosecution's suppression or failure to disclose, there is no "early sign" of a potential claim. A *Brady* claim is thus "ripe" to be made only after the suppressed or undisclosed evidence comes to light, even if this occurs after the first application has been filed. Accordingly, resolving the meaning of "second or successive" like in *Panetti* would allow this Court to

avoid the constitutional problems that would be raised by the application of § 2244(b)(2)'s "clear and convincing" standard to *Brady* claims.

B. This Court Should Grant the Petition to Resolve a Circuit Split Regarding the Standard of Review Applicable to a Successive Habeas Petition That Raises a Newly-Found *Brady* Claim.

There is significant confusion among the Circuit Courts and in the law about the standard of review applicable to successive federal habeas petitions that raise newly-found *Brady* claims. Some courts have found that a strict reading of "second or successive" in AEDPA requires that the heightened "clear and convincing evidence" standard be applied to new-found *Brady* claims, even where the state's failure to disclose exculpatory evidence was not revealed prior to the initial habeas proceedings. *See, e.g., Tompkins v. Sec'y, Dep't Corr.*, 557 F.3d 1257 (11th Cir. 2009); *Evans v. Smith*, 220 F.3d 306 (4th Cir. 2000).

Other courts, however, have recognized that doing so would interfere with the constitutional standard associated with raising *Brady* claims. *See, e.g., Lopez*, 577 F.3d at 1055 (calling the interplay between AEDPA and successive *Brady* petitions a "troublesome circumstance"); *Douglas v. Workman*, 560 F.3d 1156, 1187 (10th Cir. 2009). As discussed *supra*, these courts are correct. This Court should grant the petition to clarify that successive *Brady* claims are not governed by AEDPA's higher burden of proof.

1. The Ninth and Tenth Circuits Have Not Strictly Applied the AEDPA Standard to Successive Habeas Petitions Raising Newly-Found *Brady* claims.

In *United States v. Lopez*, the Ninth Circuit, when considering whether all second-in-time *Brady* claims should be subject to the AEDPA standard, did not strictly read AEDPA but rather applied this Court's practical approach in *Panetti*. According to the Ninth Circuit, *Panetti*: (1) established that "second or successive" should not always be read literally to foreclose certain claims; (2) "cautioned against interpreting AEDPA's 'second or successive' provisions in a way that would foreclose any federal review of a constitutional claim, or otherwise lead to perverse results, absent a clear indication that Congress intended that result"; and (3) set forth the relevant considerations for determining whether the AEDPA standard should apply to second-in-time habeas claims. *Lopez*, 577 F.3d at 1063.

The *Lopez* court applied the *Panetti* principles to second-in-time *Brady* claims. The court acknowledged that some second-in-time *Brady* claims should be exempt from AEDPA standards, reasoning that:

> [T]he broad rule the government advocates, under which *all* second-in-time *Brady* claims would be subject to [AEDPA standards], would completely foreclose federal review of some meritorious claims and reward prosecutors for failing to meet their constitutional disclosure obligations under

> *Brady*. This would seem a perverse result and a departure from the Supreme Court's abuse-of-the-writ jurisprudence.

Id. at 1064-65. Still, the court avoided ruling directly on the question, and instead determined that Lopez had failed to establish the materiality of her *Brady* claim.

The Tenth Circuit has similarly demonstrated concern about strictly applying the AEDPA standard of review to later-filed, but meritorious, *Brady* claims. In *Douglas v. Workman*, Douglas first discovered and raised his *Brady* claim while his appeal from the denial of his first habeas petition was pending. 560 F.3d at 1187. Recognizing that the petition was technically a "second or successive" claim subject to the AEDPA standard, the Tenth Circuit chose to avoid the stricter standard by treating the *Brady* claim as a supplement to the first habeas petition, instead of as a successive petition. The court then granted Douglas's petition. The court referred to *Panetti* as demonstrating that not all successive habeas petitions are subject to the AEDPA standard of review. The court then explained that the prosecutor's conduct in suppressing evidence "warrants special condemnation and justifies permitting Mr. Douglas to supplement his initial habeas petition." *Id.* at 1190. Finally, the court found that "any delay, inefficiency, or waste of judicial resources stems from the prosecution, not Mr. Douglas." *Id.* at 1194.

2. The Fourth and Eleventh Circuits Have Applied the AEDPA Standard to Successive Habeas Petitions Raising Newly-Found *Brady* claims.

By contrast, the Fourth and Eleventh Circuits have applied AEDPA strictly to *Brady* claims raised in successive habeas petitions. In *Evans v. Smith*, Evans raised an un-exhausted *Brady* claim while his first federal habeas petition was under review. 220 F.3d at 311. He asked the district court to stay consideration of his petition so that he could exhaust his *Brady* claim in state court. The district court rejected his request and denied habeas relief on his first petition. Evans then exhausted his *Brady* claim in state court and requested authorization from the Fourth Circuit to file the second petition. The Fourth Circuit denied authorization. The court applied the AEDPA standard to Evan's claim, explaining that "[t]o exempt Evan's *Brady* claim from the [AEDPA standard] would thwart the statutory scheme and render Congress' limitations on second or successive petitions a nullity in a wide range of cases." *Id.* at 324.

In *Tompkins v. Secretary, Department of Corrections*, Tompkins filed a first petition for writ of habeas corpus more than ten years after his conviction and a second petition nine years after that. 557 F.3d at 1257. His second petition raised multiple claims, including a *Brady* claim. Tompkins argued that the AEDPA standard should not apply to his claims because his claims had only recently become "ripe" under *Panetti*. The Eleventh Circuit rejected this argument, applied the AEDPA standard

to Tompkins' second petition, and found that he did not meet the standard.

3. Application of the AEDPA Standard of Review is Also Inconsistent with *Holland v. Jackson* and Related Circuit Decisions.

As demonstrated above, this Court should grant the petition because there is a strong circuit split over the applicability of the AEDPA standard of review to second-in-time *Brady* claims. The Court should also grant the petition because applying the AEDPA standard to successive, but meritorious, *Brady* claims would create an inconsistency with case law holding that federal courts can review *de novo Brady* claims that surface for the first time in federal habeas proceedings.

A number of Circuit Courts have concluded that, when a state prisoner makes a federal habeas claim based on *Brady* material that surfaces for the first time during the federal proceedings, the *Brady* claim is not inhibited by AEDPA standards of review. *See Joseph v. Coyle*, 469 F.3d 441, 469 (6th Cir. 2006) ("[Petitioner's] current *Brady* claim is not the same as the one he brought before the state court. Thus, [he] argues, his *Brady* claim was *not* 'adjudicated on the merits in State court proceedings,' and AEDPA's strict standard of review does not apply. We agree."); *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003) ("AEDPA's deference requirement does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal proceedings."); *Killian v. Poole*, 282 F.3d 1204, 1208

(9th Cir. 2002) ("AEDPA deference does not apply to [a] claim [when] [e]vidence of the [claim] was adduced only at the hearing before the [federal] magistrate judge."); *Williams v. Coyle*, 260 F.3d 684, 706 (6th Cir. 2001), *cert. denied*, 536 U.S. 947 (2002). These courts evaluated petitioners' *Brady* claims under the *Brady* standard, inquiring whether there was a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Joseph*, 469 F.3d at 473.

This Court has recognized, and not corrected, this trend. In *Holland v. Jackson*, 542 U.S. 649, 653 (2004), this Court noted that "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer" and assumed, *arguendo*, that such an analysis was correct.

This line of decisions recognizes that AEDPA's provisions should not inhibit meritorious *Brady* claims. These cases acknowledge that failure to discover a *Brady* claim is not the fault of the petitioner.

Application of AEDPA's standard of review to second-in-time *Brady* claims would be inconsistent with these principles. Further, it would create a situation where the standard of review applicable to a petitioner's *Brady* claim depends on fortuity. Petitioners who receive notice of government suppression of exculpatory evidence before their first federal habeas claim will receive one standard of

review, while petitioners who receive notice after their first federal habeas claim will receive a different, stricter standard of review. *See, e.g.*, *Douglas*, 560 F.3d at 1195 (two petitioners with identical *Brady* claims were to receive disparate treatment under AEDPA because one had already filed a habeas petition when the *Brady* claim came to light). This outcome is fundamentally unfair.

C. This Court Should Grant the Petition to Clarify the Standard for Evaluating Newly-Found *Brady* Claims in Successive Petitions in Light of the Unjust Practical Implications for Habeas Practice and Policy of Applying § 2244(b)(2)(B)'s Heightened Standard.

According to its legislative history, AEDPA was enacted to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Rep. No. 104-518, at 111 (1996). But AEDPA's goals of "comity, finality, and federalism," *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), should not overcome the constitutional rights of habeas petitioners. *See Panetti*, 551 U.S. 930, 946 (2007) (stating that this Court resists interpretations of AEDPA that would "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent"). Instead, AEDPA's purposes, along with "the practical effects of [this Court's] holdings, should be considered when interpreting AEDPA." *Id.* at 945. "This is particularly so when petitioners 'run the risk' under the proposed interpretation of 'forever losing their

opportunity for any federal review of their . . . claims.'" *Id.* at 945-46 (citing *Rhines v. Weber*, 544 U.S. 269, 275 (2005)).

Here, the practical interest in maintaining meritorious *Brady* claims based on newly-found evidence must overcome AEDPA's interest in comity, finality, and federalism.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Keith A. Findley
President
INNOCENCE NETWORK
University of Wisconsin
Law School
975 Bascom Mall
4318H Law
Madison, WI 53706
(608) 262-4763

Matthew D. Powers
Counsel of Record
Aaron Y. Huang
Christy M. Von der Ahe
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3000

Calvin Y. Cheng
WEIL, GOTSHAL & MANGES LLP
700 Louisiana, Suite 1600
Houston, TX 77002
(713) 546-5000

Counsel for Amicus Curiae

Dated: October 28, 2009

APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defence of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Griffith University Innocence Project (Australia), Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project at UVA School of Law, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence

Project, Office of the Public Defender, State of Delaware, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post Conviction Project (New York), Palmetto Innocence Project, Pennsylvania Innocence Project, Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), The Sellenger Centre (Australia), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wesleyan Innocence Project, and the Wisconsin Innocence Project.